Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand

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Much of the British empire was acquired by purchase rather than conquest, but indigenous peoples usually acquired little wealth despite extensive land sales. Explanations of where the money went tend to blame either the imprudence of indigenous sellers or the duplicity of British buyers. This article suggests that a focus solely on the conduct of the individuals operating within the land market rests on a poor theoretical understanding of the relationship between law and markets, an understanding that blinds historians to the allocative effects of markets' constitutive rules. Using New Zealand as an example, the article shows how the British modified the structure of the land market over the 19th century, sometimes intentionally and sometimes inadvertently, to transfer wealth from the Maori to themselves.

The process of colonization is often presented as a story of brute force, in which powerful Europeans simply grabbed land from weaker indigenous peoples. The story is true as applied to some colonies, but as to others, including much of what is now the United States, it rests uneasily alongside a documentary record of extensive land purchasing. The British empire was built in large part by contract.

New Zealand was the colony in which the greatest proportion of the land was acquired by purchase rather than conquest. After some uncertainty in the earliest years, the British government recognized the indigenous people, the Maori, as possessing full property rights in all of the colony's land. Over the course of the 19th century, the British bought the vast majority of New Zealand. In 1800, the Maori had owned over 60 million acres of land; by 1911, they owned only 7 million, much of which was not well suited for farming. A few million acres had been confiscated by the colonial government after the midcentury wars, but the rest was purchased in transactions with all the formalities of real

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Law & Society Review, Volume 34, Number 1 (2000)

estate sales back in England (Wards 1968:385–89; Adams 1977:176–87; Belgrave n.d.:4; Belich 1996:259). Yet at the end of this process the Maori were nearly as poor, and formed as much of an underclass, as Aboriginal Australians or North American Indians. Property ownership—the opportunity to sell land at negotiated prices, to hold out for a better price, or to refuse to sell land at all—had done them very little good. Had the British simply conquered New Zealand by force and herded the Maori onto reservations, the result from the Maori perspective would scarcely have been worse.

This outcome has posed a puzzle ever since. How could the Maori have sold so much land and ended up so poor? Transactions are normally entered into only when each side values what it will be obtaining more highly than what it will be giving up. People who sell large amounts of an asset ordinarily receive large amounts of some other asset in return. The occurrence of so many transactions in Maori land implies that the prices were often high enough to cause the Maori to choose to sell. Adequate prices for tens of millions of acres of land ought to have added up to an enormous sum of money received by the Maori over the century. Where did it all go?

Observers seeking to solve the riddle, both then and now, have blamed either the Maori sellers or the British buyers. Many colonists concluded that the Maori lacked the intelligence and experience to negotiate as equals with the British. "The Natives cannot equal the Europeans in buying, or selling, or in other things," explained Attorney General Robert Stout. "They have not gone through that long process of evolution which the white race has gone through" (AJHR 1891, G–1, 168). Others blamed the Maori for imprudently dissipating the proceeds of land sales. "[I]t is a sad thing to see these fine people exchanging their lands for drink," editorialized one colonial newspaper. "That is really what, in the end, the transaction amounts to" (*New Zealand Herald*, 18 March 1882, p. 6). This kind of explanation fit comfortably with 19th-century assumptions of racial superiority. Given a softer, more paternalistic gloss in the mid-20th century, it became a commonplace among historians that the Maori, through no fault of their own, lost their land because they just could not compete in the tough free market (Sinclair 1988:146; Condliffe & Airey 1960:113; Smith 1948:93).

Some colonists, and many of the Maori, blamed the British for duplicity of various kinds. In some of the early transactions, there appears little doubt that the British failed to explain to the Maori the consequences of a land sale, and left the Maori erroneously believing that they had transferred merely the rights to use the land in specific ways (Evison 1993:266-68; Wyatt 1991:87–91; Waitangi Tribunal 1997). In other transactions, the British made promises that were never fulfilled—promises of land reserves, of

schools, and of hospitals (Mantell 1856). Some Maori argued that they had been harrassed into selling against their will. Maori landowners "were continually urged to sell," complained Wiremu Hikairo, "and the purchasers only stopped teasing them when consent to sell was given" (AJHR 1873, G–7, 52). This sort of explanation has come to dominate recent historical writing, among historians seeking to depict the Maori as intelligent actors who could have participated in the land market as equals had the colonists been more honest (Ward 1997; 2:216; 240; Parsonson 1992:179–81; Binney et al. 1990:144).

Both explanations place the blame on individuals operating within the market in Maori land. While there is doubtless some truth to both, the focus on the conduct of individuals obscures the equally important role played by the structure of the market itself. The market in these arguments is tacitly assumed to have been distributionally neutral. It is implicitly understood to have been a level mechanism for matching the desires of Maori landowners and British purchasers, one which itself exhibited no preference for one side or the other. As section I of this article will explain, this is indeed a common conception of markets generally, but it is one that proceeds from a poor theoretical understanding of how markets are constructed and how they create values for the items bought and sold within them. Section II will sketch the construction and operation of the 19th-century market in Maori land, to demonstrate how the structure of the market itself impoverished the Maori, independent of the actions of any of the individuals working within it. That is, even if all the people on both sides had always acted honestly and intelligently—even if the Maori had always been perfectly informed as to the consequences of land transactions, even if land purchasers had always been honest, and even if the Maori had always prudently invested the proceeds of land—the Maori would still have been much poorer at the end of the century. Section III will return to a theoretical discussion of markets, this time to suggest how the common but incomplete understanding of how markets are constructed causes them to act as an ideological screen, preventing an accurate assessment of the relative effects of the structure of institutions and the conduct of the people who inhabit those institutions.

My hope is that close attention to the allocative effects of the structure of this particular market will prove useful to people studying the operation of other markets in other times and places, especially land markets in other colonial contexts. Much of the colonial world, including much of the present-day United States, was acquired by purchase. A close look at New Zealand may shed some light on colonial experiences elsewhere.

I. Markets

We are so accustomed to prefixing "markets" with the adjective "free," and to thinking of "regulation" or "law" as something unnatural coming from the outside and *intervening* in markets that were happily operating without it, that it is easy to forget how markets are constructed in the first place. If we think of a market schematically as containing traders who buy and sell some kind of asset, a market is nothing but a complex of law, defining who the traders are, what the assets are, how the traders come to own the assets, how the trading can and cannot be conducted, and how the administrative costs of operating the whole complex will be allocated. ("Law," as I use it here, of course includes not just legislation but also court decisions and all the informal norms that relate to these matters.) Law does not intervene in markets; law *constitutes* markets.

At the most basic level, a market presupposes the existence of some sort of property right that is traded within it. Without property, there could not be a market. And as Bentham pointed out two centuries ago, "property is entirely the creature of law" (Bentham 1843; 1:308). Something is my property only when the law makes it so, by penalizing people who try to take it. Property, particularly when it is to be traded in a market, has little to do with physical possession or even proximity. The clothes I wear or the food I eat, to use Bentham's examples, might be the property of someone far away, to whom the law will hold me accountable, while I might own property thousands of miles away, in the possession of someone else whom the law will hold accountable to me. Land, unless divided into absurdly small parcels, is necessarily always the property of someone who lacks physical possession of most of it at any given time. A person living among others without law, if ever such a society existed, might possess items for so long as he stayed awake and remained strong enough to defend them against others, but that sort of possession could not be called property without bending the word beyond its conventional limits. This weak version of property, even if given the name, could not in any event be traded in a market without taking elaborate steps to insure the simultaneous transfer of assets between buyer and seller. The law of property, law defining the ways in which one legitimately comes to own something, is thus one building block of any market (Hale 1923).

Or not really one building block so much as an infinite set of different building blocks. The property law of most societies, certainly that of England, is complicated and constantly changing. Different societies have different property laws. Property law can take any number of conceivable forms. Whatever form it takes will influence the construction of the markets that are built

up from it. This becomes clearest if one considers the effects on markets of dramatic changes in the law of property. Suppose we were suddenly to adopt a rule of "finder's keepers" applicable to second hand books. (Such a rule does not currently exist, at least not in the United States, for any kind of property, despite what many of us were told as children.) The market in second hand books would look quite different. Demand would drop, as some potential purchasers decided to find books instead, while others declined to purchase for fear of irretrievably losing the books later. Supply would drop in response, as reduced demand would cause some dealers to take up a different line of business. The prices of second hand books would adjust to the changes in supply and demand. The market would look very different because of a change in the property law that was a constituent element of it. It would be a mistake, then, to think of property law as a single building block, or to think of markets as uniform even in this one seemingly simple respect. If there are an infinite number of possible property laws, there are also an infinite number of ways to construct a market from them. Any given market represents a choice among countless possible markets, all of which would look different from one another.

Law also defines the circumstances under which particular assets are tradeable, a different question from how they become owned in the first place. In the United States, I can sell my labor or my time but not my person; I can sell some internal organs but not others; I can sell legal services but not sexual services (and there are people in other states who can sell sexual services but not legal services); I can give my daughter to be adopted by another but I can't sell her; the list could be endlessly multiplied (Radin 1987). Again, the permutations are infinite, and different laws will give rise to different markets.

If a market is to include transactions beyond immediate transfers of property, it will have to include contract law as another building block. In most markets, traders do not carry their assets around with them in the hope of encountering other traders; they reach agreements at one point in time, and then physically transfer the assets at a later point. This two-step process is particularly useful for land, which obviously cannot be carried from one prospective buyer to the next. A constituent element of almost any market, therefore, will be a body of contract law specifying how an agreement becomes binding on the parties to it, what sorts of actions constitute a breach of the agreement, and how the party found to have been breaching must compensate the other. And everything we have said about property law applies equally to contract law. It is complex, constantly changing, and infinitely variable. How much information must a seller disclose? What is the effect of partial payment? To what extent should the parties' unwritten intentions supersede a written con-

tract? Like property law, contract law is not a single building block so much as an infinite set of building blocks, which can help build up an infinite number of possible markets. Changes in contract law will influence supply and demand, and thus influence prices. Again, the choice among countless different contract laws will give rise to a choice among countless different possible markets.

Another constituent element of any market will be laws defining who can or cannot trade within it. No market is open to everyone. Even the most inclusive are made up in part of laws restricting the enforceability of transactions entered into by children, by the insane, by the senile, and so on. Some markets provide only limited trading rights, or none at all, to certain classes of people. From the 13th through the 19th centuries, for example, aliens were generally not permitted to buy land in England (Davies 1931:161–64). Some markets, in pharmaceuticals or certain weapons, for instance, require a special qualification for participation. Some markets are open only to individuals and not to organizations; the market for employment in the United States was like that for much of the 19th century. Some markets are open to organizations in one form but not another; under the 20th-century American antitrust laws, people gathered together as a single corporation are allowed many more kinds of transactions than the same people gathered together as a cartel of multiple corporations. And some markets are open only to particular organizations. That was true until very recently of providers of local telephone service. As we will see, it was also true of land markets in many of the British colonies, including, intermittently, New Zealand. Again, the potential choices are infinite, and will give rise to an infinite number of different-looking markets.

Finally, because markets are not costless to organize and operate, every market will consist in part of laws that allocate administrative costs among its participants. These can be harder to see, as they are sometimes not explicitly devoted to that purpose. In a given market there may not even be any laws solely for the allocation of administrative costs, but costs may be distributed simply by the operation of all the laws already discussed. Sometimes, however, the laws allocating administrative costs are easily identified. The costs of contract enforcement include court fees, attorneys' fees, and so on, and there are distinct bodies of law addressing these subjects. The cost of putting some kinds of property into tradeable form—obtaining a patent or a trademark, for instance—can be specified and allocated. The law's allocation of these costs need not bear any relationship to their eventual incidence, as the costs may be passed along to someone else in the market. But to the extent that the initial allocation makes a difference, this kind of law will also form an infinite set

of building blocks, permitting an infinite number of different markets.

In each of these areas of law, no single choice is any more "natural" than any other. There is no unique set of property and contract laws, no unique set of laws governing who can trade and how the costs of trading will be allocated among them, that can serve as a baseline "free" market, from which any change could represent a departure (Kennedy 1985:961–67). Of course, this is not to say that all markets will be equally successful at maximizing aggregate welfare. Some kinds of markets will obviously do this better than others. But it is a mistake to think of the optimal market in this sense as the most free or the least regulated by law. The optimal market, like any other, will be constituted by some set of laws, not the absence of law. There is no nonarbitrary way to differentiate the law *constituting* a market from the law supposedly *regulating* or *intervening in* the market. A market is made up of laws like a crowd is made up of people. One could no more pick out a set of laws that constitute a "free" market than one could pick out a set of people that constitute a baseline "true" crowd. The addition or subtraction of one person would change the nature of the crowd, just like a change in the law will change the nature of the market. In either case, all one can say is that there is an infinite variety of crowds or markets, not one "natural" crowd or market of which the others are "artificial" variations.

Because there is no such thing as a single "free" market, there is no such thing as a single market price. A given item could have any number of market prices, depending on how the market is constructed, because different sets of laws will yield different supply and demand conditions. None of the possible market prices is any more true or natural than any other. The laws that establish a market are created in the political process, like any other laws. Higher or lower prices will obviously benefit sellers or buyers respectively, and so people who expect to be primarily in one role or the other will attempt to influence the wording of the laws that construct the market, in the same way that they attempt to influence the production of other laws. But that influence cannot be accurately criticized as "political" interference in the working of an otherwise nonpolitical market. If successful, it would cause the market to switch from one form to another, but there is no ground for calling the second form any more "political" than the first.

These observations are hardly original, but they can be easily forgotten when examining particular markets. Bearing them in mind, we can now turn to the market in Maori land in 19th-century New Zealand.

II. Maori Land

A person's nationality by and large determined his role in the 19th-century market in Maori land: the Maori were sellers, and the British were buyers. Throughout the century, the colonial government continually adjusted the complex of laws that constructed the market in ways that caused the prices received by the Maori to be lower than they would have been otherwise. Three kinds of law were particularly important in this regard: (A) the law governing who could purchase Maori land, (B) the law governing who could sell Maori land, and (C) the law governing the allocation of the administrative costs of establishing the market. These will be taken up in turn.

A. Purchasers

The earliest colonists, mostly traders and missionaries, typically bought plots of land from the tribe that controlled the area in which they lived, in exchange for such commodities as guns, ammunition, tobacco, blankets, clothing, and tools (e.g., Mitchell 1833 and 1836). As the early trader J.S. Polack explained, a prospective purchaser needed to deal with the chiefs of the relevant tribes and subtribes and ask each "to speak with his friends and the claimants of the extent and situation of the allotment you may require, stating the amount you propose giving." Each chief would "acquaint his tribe of your proposals, and after discussing the matter, if all the parties, who are interested, feel agreeable to dispose of it, the chief will send for you." Payment was then "delivered to the principal chief, who distributes to each claimant what he imagines he may be entitled to" (Polack 1838; 2:205–6). This general sort of procedure appears to have eventually developed wherever settlers offered to purchase land. While the concept of selling land was new to the Maori, chiefs had traditionally possessed the authority to represent the tribe in its interactions with other tribes and to distribute unallocated resources. Chiefs seem to have been able to slip naturally, whenever a land sale was proposed, into the roles of negotiator, coordinator of tribal discussion, and distributor of the proceeds. All three roles required an intimate knowledge of the relative property holdings and social standing of tribe members, knowledge not easily available to outsiders. When asked in 1838 by the House of Lords how he figured out whom to pay for the land he purchased, the missionary John Flatt expressed his relief to have discovered that "[t]hey settled that Difficulty among themselves." As Flatt conceded, "I do not know the exact Rule" (BPP, 1 Lords 48). A prospective purchaser did, however, need to know something about the tribe's political organization, in order to be sure that the people with whom he was dealing were in fact author-

ized to represent everyone holding use-rights in the area he sought to purchase. Such local knowledge could in practice come only after a period of residence among the Maori.

Expectations in 1839 and early 1840 that New Zealand would soon become an English colony produced a flood of purported land purchases on the part of speculators, who hoped that the prospect of increased English immigration would cause land values to rise. Some of these purchases were so large that acres or square miles were inadequate measurements; the deeds could be worded only in degrees of latitude. When William Wakefield, for instance, in 1839 bought on behalf of the New Zealand Company the northern part of the South Island and the southern part of the North Island, the southern boundary was at 43 degrees, while the northern boundary was a line running from 32 degrees on the east coast to 41 degrees on the west (Wakefield 1839). William Wentworth and John Jones, two Sydney speculators, went even further; they bought the entire South Island in early 1840 (Wentworth 1840). These purchases were also for commodities, often in astonishingly small quantity. John Ward, the Secretary of the New Zealand Company, somewhat sheepishly informed the House of Commons that Wakefield's purchase was estimated to include 20 million acres of land, and had been purchased for goods worth approximately £45,000. Having acquired the land for less than a halfpenny per acre, Ward admitted, the Company was busily selling it to settlers at a pound per acre (BPP, 1 Commons 71–74).

Most of these nonresident speculative purchasers knew virtually nothing about Maori property ownership or political organization (Burns 1989:89). When these transactions were investigated by the new colonial government in the early 1840s, the supposed Maori sellers were typically found not to have possessed the authority to speak for all the rights-holders within the enormous zones purchased. When, for example, the New Zealand Company's claim to the area that is now Wellington was examined, William Wakefield could produce only one Maori witness to the transaction, who promptly confessed that he had no right to sell the land (Miller 1958:65-67). The sum of all these early individual purchases is often said to have exceeded 66 million acres, the total land area of New Zealand.

"Was there ever such a mess?" asked one newspaper (*New Zealand Spectator*, 22 Feb. 1845, p. 4). The new colonial government took two steps to sort it out. As to past transactions, it established a land claims commission, with the authority to validate or reject all private land purchases from the Maori. Land purchased from people lacking the authority to sell, or purchased by means of fraud, or purchased at too low a price (determined not by abstract justice but by a stated scale of prices), was returned to the Maori. Purchases were capped at 2,560 acres; all validly

purchased land in excess of this amount was retained by the Crown. Most of the purchases were so patently unsupportable that they were not even submitted to the commission. Of the 9.3 million acres submitted, only 468,000 were found to have been obtained validly, of which 142,000 were retained by the Crown as surplus. That left 326,000 acres in the hands of settlers, and 8.8 million returned to the Maori (Moore et al. 1997:258, 297).

As to future transactions, the new government prohibited private purchasing entirely. The English text of the 1840 Treaty of Waitangi, the document that formally ceded sovereignty to Britain, had given the Crown "the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate." The principle of preemption—that only the Crown, not private individuals, can buy aboriginal land—was by 1840 a long-standing practice in the older English colonies in North America. It had been adopted by the United States. It was familiar to English officials in New Zealand and in the Colonial Office (McHugh 1991:102–3). A few years later, the Supreme Court of New Zealand, drawing heavily on past American practice, would reaffirm the principle, on the ground that because under English law the Crown is the source of all land titles, title obtained from elsewhere is no good as against the Crown (*R. v. Symonds* 1847:388-89). One of the new colony's very first statutes accordingly stated that "the sole and absolute right of preemption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty," and that all other pretended purchases without the government's consent "shall be absolutely null and void" (An Ordinance to Repeal. . .1841, Stat. No. 2, § 2).

For most of the next twenty-five years, land purchasing was a function performed by the colonial government. The sellers were still tribes, and transactions were still arranged in much the same way (e.g., AJHR 1858, C-5). "The money would be laid down in a lump in the presence of all the people," Hone Peeti recalled years later, "and subsequently it would be disbursed amongst them" by the chiefs (AJHR 1891, G-1, 54). Government land purchase agents, working year in and year out among the Maori, often attained fluency in the language and familiarity with Maori property arrangements and political organization, knowledge that smoothed the course of dealing. Their surviving journals suggest the degree of effort that could go into the project of purchasing land. James Grindell, an interpreter with the Land Purchase Department in the 1850s, noted that while waiting for a tribe's response to a purchase offer he "[e]mployed myself the remaining part of this week making out a genealogical list of the various tribes and families in the Manawatu, with a short notice of their claims to the lands which they occupy for my guidance in future negotiations with the natives" (Grindell 1857–58:90–91). Between 1846 and 1853, these full-time, knowledgeable purchas-

ers acquired on the government's behalf 32.6 million acres of land, or just under half the country, at an average purchase price of less than a halfpenny per acre (Belich 1996:225). Government purchases were concentrated in the sparsely populated South Island, 30 million acres inhabited by fewer than 3,000 people. A major purchase in 1848, as one newspaper put it, "extinguishes the native title in the Southern Island," but for a small portion at the extreme south (*New Zealand Spectator*, 21 June 1848, p. 2). By 1860, virtually the entire South Island had been sold "for an almost nominal sum," as Governor Gore Browne put it (AJHR 1860, E–6a, 3). Although the government had managed to purchase several million acres in the North Island as well, most of the North Island remained in Maori hands.

In many of these transactions the Maori were disadvantaged by inexperience in selling land. The British, having previously colonized other places, were much better able to predict the future course of land prices. Especially in the early years, the Maori often misunderstood the consequences the British intended to flow from a sale. Yet all these circumstances would have been much less important had the colonial government not been the sole legal land purchaser for all but one of the years 1840 to 1865. In a differently structured market, where multiple would-be land purchasers competed with one another to buy land, Maori beliefs as to the meaning of a sale would not (assuming for a moment the absence of transaction costs) have affected the prices the Maori received for land. The purchasers would have bid up prices to the level at which they would have been had the Maori possessed complete information as to the intentions of the English. The same is true of Maori inability to predict future prices. If prospective purchasers had to compete with one another, the market price for land would have turned out the same. Inexperience in negotiating might have mattered, to the extent that it would have caused the Maori to accept an early offer rather than waiting for a better one, but that is a lesson that could have been easily learned. No market is costless, of course, and the high costs of transportation and communication probably made colonial land markets less perfect than most. Transaction costs would have caused Maori misunderstanding and inexperience to have had some effect on prices even in a market with multiple purchasers. But even in an imperfect market, competitive purchasing would have yielded higher prices.

Instead, the government was able to exploit its informational advantage to a far greater extent than it could have in a competitive market. If an offer to buy land was misinterpreted as an offer to share use-rights, a low price might not seem as low as it really was, and there were no other purchasers legally entitled to offer a higher one. If the Maori wrongly believed that land prices would remain stable, they might accept an inadvisably low price, with-

out the chance of being rescued by another prospective purchaser offering a better one. A competitive market is a powerful corrective for ignorance. One need not know the market value of what one owns in order to receive its market value upon sale. When there is only one lawful purchaser, on the other hand, a seller will pay very dearly for ignorance, as the purchaser can squeeze out the full disparity between what an asset is really worth and what the seller thinks it is worth. Between 1840 and 1865, that is in large measure what happened to the Maori.

The power of preemption made the colonial government simultaneously a monopsonist with respect to the Maori and a monopolist with respect to the English; it was the only lawful purchaser of Maori land and the only lawful seller of Maori land to settlers. Economic theory predicts that the government would realize a tidy profit in these roles, and in fact such was the case. By 1844, the government had paid slightly more than £4,000 for land, but had realized over £40,000 in land sales. Similar profits continued through the 1850s (Simkin 1954:66-67, 72). The result was a steady stream of revenue for the government, which was spent on government services (Rigby 1992). Because the government was English, staffed entirely by English people and managed primarily for the benefit of the settler population, land revenue was disproportionately spent on them. The net effect of preemption was to transfer wealth from the Maori and English purchasers of Maori land to the English population generally. Most of the English residents of New Zealand were at one time or another purchasers of Maori land, so the net effect was very nearly a wealth transfer from the Maori to the English.

The Maori were not slow to figure this out. "The natives have heard of the Government buying at a cheap and selling at dear rate," explained a man named Paora. "They do not like it. The natives do not know what is done with the money" (BPP, Volume 10:555). The English humanitarians with an interest in the Maori complained as well. "From the *smallness of the price paid, and the largeness of the price demanded by the resale*," argued the *New Zealand Journal* (8 June 1844, p. 487), "the natives are taught to know and to believe that they are oppressed and unfairly dealt by." As a result, William Porter observed on the floor of the House of Representatives in 1855, "the Natives [are] anxious to sell to settlers, but averse to sell to Government—a difficulty which would increase as the Natives acquired more intelligence" (NZPD, 1855:480).

In the first few years of preemption the colonial government's land purchasing budget was too small to permit the purchase of much land. As the government's Chief Protector of Aborigines explained, "when the natives found that the Government would neither buy, nor allow other persons to do so, they became very indignant, and unsparing in their remarks" (Clarke

1846:5). Governor Robert Fitzroy pleaded with his superiors in England to do something about the stream of Maori complaints he was receiving. "They called on the Government to buy, or let others buy; and great discontent has been caused among them by the inability of the Government to do either" (BPP, Volume 4:178). The colonial government was meanwhile hearing complaints from the other end as well. Prospective purchasers agitated for the right to buy land directly from the Maori (Busby 1859:14). Some new settlers, deterred from buying land by scarcity and high prices, began squatting on government land (*New Zealand Gazette*, 19 June 1841, p. 2). Others began illegally purchasing from the Maori (White 1908–09:11).

In response to this pressure from both sides, Fitzroy announced in March 1844 that he would waive the Crown's right of preemption and permit private purchases, provided that purchasers paid a fee of 10 shillings per acre to the government, a tax that proved prohibitively high. In October, Fitzroy lowered the tax to one penny per acre. A wave of private purchasing promptly took place, as the pent-up demand to buy and sell land ran its course. "[P]erhaps no measure emanating from the government, since it was established," Fitzroy reflected happily, "gave so much real satisfaction to the people" (Fitz-Roy 1846:35). The colonial government's authority to waive the right of preemption was, however, dubious. The 1841 statute declaring the Crown's right of preemption had not prohibited private purchases in a strict sense; it had only declared those void "which are not or may not hereafter be allowed by Her Majesty" (An Ordinance to Repeal. . ., No. 2, § 2). Fitzroy may have believed that this provision gave him the authority to "allow" all private purchasing. If so, his superiors in London quickly disagreed. Fitzroy was recalled. The legislature enacted the Native Land Purchase Act of 1846 (Stat. No. 19), which reestablished the right of preemption, and made it even stronger; private transactions were no longer simply void, but were now made a crime. The following year, in a test case provoked by Fitzroy's successor, George Grey, the Supreme Court held that Fitzroy's waiver had been invalid (*R. v. Symonds* 1847; Spiller 1992:45–46).

The reestablishment of preemption coincided with the onset of a long period of adequate financing for government land purchases. After 1846, Maori land could easily be sold, but only to the government. "[T]here being but a single buyer and no competition," admitted former Attorney General William Swainson, "the price given is below the market value" (AJHR 1860, E–1, 31). The prices paid by the government for Maori land throughout the colony were not much higher than those paid by speculators before 1840. In the Auckland area before 1865, the Crown bought 1,643,234 acres for £90,746, for an average price of slightly over a shilling per acre (Daamen et al. 1996:219). In

Wairarapa in the years 1853–54, the Crown bought 2,056,699 acres for £23,547, or an average price per acre of less than three pence (Goldsmith 1996:114). Crown purchases in Hawke's Bay between 1851 and 1862 amounted to approximately 1.5 million acres, for just under £40,000, or an average price per acre of a bit over six pence. Price comparisons between different periods are never perfect because of the many factors that can influence prices and because of the variable quality of land offered for sale, but it is at least suggestive that after Hawke's Bay was opened to competitive private purchasing in 1865, private purchasers acquired 145,233 acres in the district between 1865 and 1873, for a total of £101,335, or an average price per acre of over 13½ shillings (Cowie 1996:60, 99). Land prices obtainable by the Maori from private purchasers were 27 times higher than prices obtainable from the government. After several years spent purchasing nearly the whole South Island on the government's behalf, Walter Mantell concluded that he had acquired over £2,000,000 worth of land for the payment of £5,000 and promises of schools and hospitals (Mantell 1856).[1] Schools and hospitals for a population of 3,000 were worth nowhere near £1,995,000 in the first half of the 19th century. Most of the shortfall is attributable to the government's monopsony power.

Preemption was defended primarily on paternalistic grounds. Settlers and land speculators, it was often urged, would quickly swindle the Maori out of their land if unchecked by government. (The implicit assumption in the argument was that government land purchasers would use more honorable methods.) Government was needed as a mediator between greedy buyers and easily duped sellers. "A chapter might be written respecting the evils that must ensue to the natives by giving away their land," lectured the *New Zealand Spectator* (9 Nov. 1844, p. 2), in the course of criticizing Fitzroy for waiving the right of preemption, "and introducing a population compared to which, the first settlers in America who destroyed the Indians, were angels of light." Looking back on the land scramble of 1839 and 1840, the argument for government mediation made some sense. No longer were speculators purporting to snap up huge territories from Maori lacking the authority to sell. The government purchasers of the 1840s were more careful in attempting to secure the consent of the proper tribes, and the proper individuals within those tribes. And if prices were not very high, they were at least a bit higher than they had been during many of the so-called purchases of 1839 and 1840. Preemption was an established part of English colonial policy, much older than the colonization of New Zealand, but it seemed a perfect fit for the new colony.

[1] Mantell's figures may have been a bit off (see Butterworth & Young 1990:25), but not far enough to make a difference.

The argument contained a great deal of hypocrisy as well, as was frequently noted at the time. Government monopsony was not the only alternative to a market permeated with fraud. An obvious third path would have been to allow competitive private purchasing, and thus provide the Maori with higher prices, while policing the market to prevent the reemergence of the dubious transactions of 1839 and 1840. But doing so would have required the colonial government to give up a major source of revenue in the spread between purchase and sales prices for Maori land, and that cost was too high. "The object of the preemptive right is less to protect native interests, than to prevent the Natives from coming into competition with the Crown in the disposal of waste lands," argued one of preemption's sharpest critics. Preemption's long life as part of English colonial law was doubtless due in large part to the advantage it gave to the government rather than to any benefits it provided for the native population. In New Zealand, preemption had been instituted ostensibly "to prevent third parties from taking undue advantage" of the Maori, but by forcing the Maori to accept a purchase price well below what it would have been in a competitive market, "the Government thus stands in the place of these very third parties, and whilst professing solicitude for the welfare of the Natives, literally renders them the victims of its own cupidity" (Chamerovzow 1848:382, 386). All the problems the Maori had in negotiating with private purchasers—the inability to predict future prices, the failure to understand what the British meant by a sale, and so on—were accentuated when the Maori sold to the government, because the government faced no competition that might have pushed prices higher.

Preemption was possible only because the English were politically organized into a single unit capable of enforcing its monopoly over land. Had the Maori been able, they could have fought back with the same weapon by forming a single organization to control the sale of land, and then either setting the price of land higher than that offered by the government or refusing to sell at all. If one analogizes the sale of land to the sale of labor, the Maori would have been like the early labor unions, responding to the consolidation and collaboration of their employers by doing the same. For much of the century, the Maori would attempt to pursue this strategy, but with only limited success. In the 1840s and early 1850s, the Maori were simply too divided to organize in this way. Ancient tribal divisions could not be erased in a few years. Preemption was thus an instance of the importance of political organization in structuring the marketplace. Two peoples converged, and the better organized was able to take wealth from the poorly organized.

Preemption was formally abandoned in 1865 (this time with the consent of the imperial government) when the market was

reopened to private purchasers, who were allowed to purchase land the Maori ownership of which had been confirmed in the newly established Native Land Court. The government stopped purchasing Maori land at the same time. But preemption would soon return in a different form. The Immigration and Public Works Act Amendment Act of 1871 inaugurated a public works boom by authorizing the colonial government to acquire Maori land for three purposes: gold mining, the establishment of settlements, and railway construction. The government, like private purchasers, had to go through the Native Land Court, but the statute gave the government two advantages. First, and less important, the government could arrange to purchase land before the land had passed through the Native Land Court. This was more of a paper advantage than a real one, as private purchasers routinely did the same without legislative approval. Second, and far more important, the 1871 Act restored a large measure of the monopsony power enjoyed by the government between 1840 and 1865. When the government "determined to enter into negotiations for the purchase" of Maori land, it needed only to insert notice of that intent in the *Gazette*, and other prospective purchasers were thereafter barred from competing against the government to buy the same land (Immigration and Public Works Act Amendment Act of 1871, Stat. No. 75, § 42; Marr 1997:81). The full scope of preemption was restored in 1877, when the government was authorized to purchase Maori land, by the same procedure, for any purpose at all (Government Native Land Purchases Act of 1877, Stat. No. 30, §§ 2-3). A land purchasing branch of the Native Department was reestablished in 1873, with funding and staffing at adequate levels to permit government land purchasers to begin work in earnest that year (AJHR 1873, G–8; Spiller et al. 1995:149). Although private purchasers continued to buy land as well, the government's power to prohibit private competition meant that the economic effect of the scheme, for owners of land the government desired to purchase, was identical to that of complete preemption.

Later in the century, from 1886 to 1888 and again from 1894 to 1909, private purchasing was prohibited, and complete government preemption was restored (Native Land Administration Act of 1886, Stat No. 23, § 33; Native Land Act of 1888, Stat. No. 36; Native Land Court Act of 1894, Stat. No. 43, § 117; Native Land Act of 1909, Stat. No. 15, § 207). In these periods, with minor exceptions, Maori landowners had to sell to the government or to no one. The latter period of preemption facilitated a large program of government purchasing, in which, in the 1890s alone, the government acquired 2.3 million acres of Maori land. It is not surprising that monopsony, whether in its complete or limited form, allowed the government to acquire land at prices lower than those available in the private market. Between 1871

and 1884, the government paid an average of slightly over 3 shillings per acre for Maori land, or 53% of the price paid by private purchasers, which was already depressed by competition from cheap government sales of land acquired before 1865 (AJHR 1884, C–2; AJHR 1885, G–6).[2] No one was surprised: "it would be very strange," one newspaper commented, if the government "could not in nearly every instance make far more profitable bargains than private speculators" (*Hawera and Normanby Star*, 12 Sept. 1883, p. 2). During the great government purchasing of the 1890s, the average price paid by the government was 4 shillings per acre. In some instances, the government price was only 20% of that offered by private settlers (Brooking 1996:131–34, 140–41).

In principle, the government still faced possible competition in the Native Land Court, as people who agreed to sell land to the government still had to prove their ownership of the land, sometimes in the face of opposition from competing claimants who did not wish to sell. Often land had to be partitioned into two blocks, one for the sellers and another for the non-sellers. Even in these circumstances, however, sellers backed by the government normally had an overwhelming advantage in the Native Land Court over the non-sellers. The judges all understood sales to represent progress. In assigning ownership, one lawyer who practiced in the Court explained, the "Judge would not be human if he did not give some favour to the Government, and so give a share to every Native who had sold, notwithstanding that perhaps those who sold, as very often would be the case, were those of the smallest consideration" (AJHR 1891, G-1, 143). The sellers also found their side of the litigation subsidized by the government, who could offer food and transportation to ensure the presence of witnesses favorable to the government's case. Non-sellers, who had no source of financing and who could not deduct the cost of litigating from proceeds of land they had no intention of selling, had a much more difficult time presenting their side (Wikaira 1995:98).

The government's deep pockets gave it another advantage not possessed by private purchasers in overcoming the resistance of Maori property owners who did not wish to sell. In some parts of the country, government land purchasers instituted what became known as the "raihana," or "ration," system, in which the Native Department would permit local merchants to draw on government funds for goods purchased on credit by Maori landowners. The debts would be transferred from the merchants to the Native Department. When the debts remained unpaid, the government would use the Native Land Court to foreclose on the land.

[2] Private purchase data run from 1873 to 1885.

The system apparently began as soon as the government resumed land purchasing in 1871 (Native Land Court Report 1882:9). In 1872, James Mackay sent word that he anticipated acquiring much of the Coromandel Peninsula "at a price not exceeding 2s. per acre. I have made considerable advances on account of these purchases, having either paid for, or made myself privately responsible for goods and stores amounting to £1,367 1s. 5d" (AJHR 1873, G–8, 7). What made government credit so much more insidious than private credit from the Maori point of view was the government's monopsony power in the land purchasing market, which effectively caused foreclosure prices to be much lower than they would otherwise have been. A property owner owing debt to the government could not sell his land to a third party and then use the proceeds to pay his debt; that was illegal once the government had gazetted its intent to acquire the land. He instead had to sell his land to the government, his creditor. The fact that he needed to be rid of the debt deprived the property owner even of the single alternative ordinarily available to sellers facing a monopsonist, that of not selling. He *had* to sell his land, at prices the government could, in effect, dictate to him (Anon. 1877:13).

The value of land acquired in this way by the government could be much higher than the value of the goods originally purchased by the former Maori owners. And this was when the process was conducted honestly. Often it was not. Merchants, who were selling to one person but obtaining payment from another, had no difficulty charging higher prices to the government than the Maori purchasers believed they were paying at the time. The books would balance in the end, but again the value of the land would exceed the value of the goods supplied. "If my land is paid for with that which I do not know the cost of," argued an angry Te Moananui at an 1874 meeting with Native Department officials, "I shall not know how much I am getting for it" (Anon. 1874:8). In such cases even the monopsony prices paid by the government overstated the value actually received by Maori sellers.

B. Sellers

By the mid-1850s, the tribes inhabiting much of the North Island had succeeded in organizing so as to prevent further land sales. A Board of Inquiry examining land purchasing practices reported in 1856 on the formation of "a league," the members of which "refuse to sell their lands. . . . This league . . . embraces nearly the whole of the interior of the island, and extends to the east coast and to the west coast" (BPP, 10:514). At "a grand council of nearly all the most influential chiefs of this island," the *Spectator* reported in 1856 (24 Dec.,p. 3), "[t]he first subject of

discussion was the land: it was unanimously decided that no more should be sold by the natives to the Government." The "King movement," as the organization soon became known, was formally headed by a king whose authority was recognized by the constituent tribes. The King lacked much true governmental authority, which remained with the tribes. He was instead largely a formal device for mutually agreeing not to sell land; each tribe would place its land under the King's authority, which gave the King the right to forbid sales (Sinclair 1961:75).

"Our first object is to make fast the land," summarized Tomo Whakapo at one King movement meeting. "Men have heard in all parts of the island, and have brought their land and themselves too, and said [to the King] here is our land and our blood, hold them fast" (Buddle 1860:51). Later in the century, when the King movement occupied a more concentrated territory, it would take on many of the characteristics of an independent state. But in its early stages it was primarily a confederation of tribes who agreed not to sell land to the government. "O man who persists in selling land," exhorted the movement's newspaper, *Te Hokioi*, "[y]ours is not simply a sale, but a casting away of the sacred things of God. . . . Although the parcel of land may be yours, you will not be allowed to sell it" (Anon. 1863). By 1860, entire districts were reported to be in sympathy with the movement, and land sales had nearly ground to a halt (Binney 1995:36).

Agreements not to sell are usually very difficult to enforce because of the opportunities for profit available to defectors. Each participant faces a strong incentive to be the first to cheat, in order to become the only seller of a commodity the cartel has made scarce. For this reason most cartels do not last very long. The King movement succeeded in restricting sales in part because of the government's power of preemption. Unlike most sellers, Maori land sellers faced a single purchaser. A restriction on the supply of land would not cause the price of land to go up unless the government was willing to pay the higher price. Because the government would not pay a higher price, would-be defectors were not tempted by the prospect of land prices higher than normal. A defector would face a price no different from the ordinary price, which, as we have seen, was well below what the price would have been in a competitive market. Without this incentive to cheat, there was little cheating.

The King movement also succeeded in restricting sales because the Maori were able to exploit the high transaction costs associated with purchasing land from tribes. A rough tribal consensus was required to sell land, which meant that any sizeable contingent opposing a sale, even one well short of a majority, would be able to block it. Once a contingent of that size sympathized with the King movement, *all* future sales would effectively

be blocked. High transaction costs had hindered the Maori in the early years, when sales were viewed as desireable; they helped the Maori in the 1850s, when sales were undesireable.

Resistance to land sales succeeded just as increased emigration was causing the British to anticipate a great increase in the demand for land. Strong public pressure was placed on government officials to assure an adequate supply of land (AJHR 1860, E–6a, 4). Maori efforts to restrict sales were accordingly viewed with alarm by the government. "Submission to Her Majesty's Sovereignty," Governor Gore Browne lectured a Maori assembly in 1861, requires that "men do not enter into combinations for the purpose of preventing other men from acting, or from dealing with their property, as they think fit. This is against the law" (AJHR 1861, E–1, 11–12).

Looking back two decades later, the minister James Buller conceded that "[t]hey had the same right to make such a league as the British workmen have to form 'trades unions,'" but that didn't mean he had to like it. "[I]n the one case as in the other," he concluded, "the tendency was mischievous, because of the coercive spirit" (Buller 1878:407). British sympathy for restricting land sales was considered nearly tantamount to treason. When two missionaries anonymously published a circular urging the Maori not to sell their land, the result was a government investigation (Bagnall 1982). Officials looked for signs that the movement "was likely to die out," as one reported hopefully, or that "there are few amongst the Natives who will not admit that the arguments we use to shew them that it would be for their good to sell the land are right and proper" (Halse 1857; Flight 1857). But such signs were few.

To break this resistance, colonial officials reconstructed the market. After a few years of statutory experimentation, the New Zealand Parliament eventually passed the Native Lands Act of 1865, which set up a new court, the Native Land Court, to assign land titles to individual Maori, and authorized Maori owners of such land to sell the land to private purchasers. The Native Lands Act proved extraordinarily successful in breaking down Maori resistance to land sales, and thus reducing the price of Maori land, because it transferred decisionmaking authority from tribes acting collectively to Maori wishing to sell. To see why it was so successful, it is useful to discuss the workings of the Native Land Court generally, before considering details and later statutory changes. Most of the details and variations, as we will see, made the process far more disadvantageous to the Maori than what is described here. The point here is that, even without these disadvantages, the Native Lands Act would have forced open the market in Maori land. The stylized and overdrawn account given in the next few paragraphs is an unrealistically rosy (from the Maori point of view) picture of how the Native Land

Court worked, to isolate the role played by the structure that the Act imposed on the land market—independent of equally important issues like the costs of Court proceedings or the attitudes of Court personnel. These are considered later.

Any single Maori person could start the machinery of the Native Land Court by filing an application to have title ascertained, even if every other tribe member wished to keep out of the Court. Because rights to land were often the only significant asset a Maori person possessed, and because the steadily expanding market economy offered increasing opportunities for going into debt, the odds were good that at least one tribe member would need to sell. As the 1873 commission appointed to examine land purchasing in Hawke's Bay discovered, "[n]early all the sales which we investigated were made . . . in discharge of a previous debit balance" (AJHR 1873, G–7, 2). A single individual's filing in the Native Land Court would necessarily draw the entire tribe into Court, because the Court would be determining the rights of everyone in the land, not just the initial applicant. If one stayed out of the proceeding, one risked losing one's interest in the land. As Wiremu Pomare complained in 1871, "I object to any one person being able to demand an investigation for any block of land. Where many are concerned, no one man should make a claim without the consent of a majority of those interested" (AJHR 1871, A-2a, 35). Even if the collective tribal interest lay in keeping land out of the Native Land Court and off the real estate market, as more and more Maori began to perceive, this sort of collective action was extraordinarily difficult because it required keeping every single tribe member from taking on more debts than he could repay without alienating land, and persuading every single member to eschew what was by far his most accessible way of earning money.

The proceeding resulted in the issuance of a certificate of title to all the tribe's members collectively, evidencing their ownership of the land in question. A few hundred people would collectively be the registered owners of a large block of land. That was not, in itself, enough to cause the land to be sold if most of the owners did not wish to sell. Here, however, the standard rules of English property law created another collective action problem. If 500 tribal members together owned an unpartitioned block of land, each possessed the right to use the entire block. The law did not recognize particular rights of individual people, whether to geographic space or to the use of any one resource. This was true of all land, not just Maori land, although of course little or no non-Maori land was owned collectively in this way by large numbers of people. Each of the 500 owners would also have the right to sell or lease his interest. A purchaser or lessee would acquire exactly what the seller or lessor had possessed—the right to use the entire block, shared with 499 other

people. Sometimes those 499 were not on the land at all, because of the traditional mobility of Maori tribes among different parcels. If they were on the land, they were most likely using it in the traditional way, by exploiting resources on a small scale, without interfering with the similar rights possessed by others.

In principle, all it took was a single Maori owner with debts to pay, and a single English settler willing to risk a small investment, for this scenario to occur: The settler leases the owner's share. He puts his cattle out to pasture on the entire block, without regard to the use-rights of anyone else on the land. The other 499 owners have no legal redress; under English law the settler has the right to use the entire block. They do too, of course, but, unlike the settler, they may still feel constrained by the norms of Maori resource use, which prevent them from encroaching on the property rights of other tribe members. In any event, without capital to invest, the other 499 owners could not obtain the cattle and other items they would need to mimic the settler, and they could not get that capital without selling at least some of the land. Traditional law offers no redress to the owners either, because the settler is highly unlikely to admit its authority, and the only way to enforce it would be physically to drive the settler off his land, an act that would be punishable under English law in the colonial courts. The other 499 owners, accordingly, have to accept that their entire block will be occupied by someone else. Their only realistic choices is are to formalize the situation—and receive some money—by selling their interests to the settler, or to continue to submit to what is, from their perspective, an unremunerated occupation, with no end in sight. A sale could come to look pretty good. And so, owner by owner, a settler could acquire all 500 shares in the block of land, even if only one owner wishes to deal with the settler at the start of the process, and even if that owner only wishes to lease his interest. Individual Maori owners, when recognizing in advance that this pattern of incentives would be created, would have no reason to expect that all 499 of their co-owners would decline to sell, and so they would be pushed toward selling under circumstances in which they otherwise would not sell (AJHR 1884, G–2, 3). The Native Lands Act, in conjunction with background principles of English property law, created a formidable collective action problem. Once land had been passed through the Native Land Court, even if the collective tribal interest was to avoid selling, individual interests were often enough to cause a sale.

The same scenario could occur even without the first step of an application to the Native Land Court. Leases or purchases of land that had not been through the Court—land for which aboriginal title had not been extinguished—were void, and so could not be enforced in courts, but entering into these types of agreements was not criminal. The hypothetical settler could get

his lease from any individual on any Maori land, with payment conditional on his lessor's application to the Native Land Court for a certificate of title. The result would be the same: land sold where the vast majority of owners would have wished, in the absence of the collective action problem, not to sell.

Later statutes addressed the issue with only slight effect. The Native Lands Act of 1869 (Stat. No. 26; § 15) banned sales by less than a majority in value of the grantees of any Maori land. The Native Lands Act of 1873 (Stat. No. 56) mandated that sales or leases be consented to by *all* the grantees. The same statute required Native Land Court judges, upon receiving an application to put land through the Court, to make a preliminary inquiry to ascertain whether the application was "in accordance with the wishes of the ostensible owners thereof" (Native Lands Act of 1873, Stat. No. 56, §§ 59, 62, 38). Such provisions only pushed the collective action issue earlier in time. Now the hypothetical settler needed to pasture his cattle and secure the consent of the sellers before, rather than after, signing the contract and applying to the Native Land Court. In any event, the 1873 preliminary inquiry requirement, a task resented by the Court's judges, was effectively repealed by an 1878 statute making it optional with the judges rather than compulsory (Native Land Act Amendment Act Stat., No. 40, § 6). The weakness of this legislative response unsurprisingly suggests that the British were more interested in purchasing land than in facilitating Maori resistance to selling.

The real collective action problem was not quite so stark, which facilitated land sales all the more. The fraction of Maori owners wishing to sell their land was not as low as one in 500. "Opinion is much divided on the question," one Resident Magistrate reported in 1880. "Some are for shutting up and monopolizing their lands altogether; some are for selling portions thereof, so as to let in the European element; and others—the extravagant and reckless—would part with every acre they have" (AJHR 1880, G–4, 14). The effect of the Native Lands Act was to empower whatever fraction wished to sell to impose that view on the others. Before 1865, when selling had required a tribal consensus, a minority could prevent a sale. After 1865, a minority could force a sale. "It is known to the people that there is trouble arising from the Native Land Court," despaired Aperahama te Kume, but "notwithstanding that, they still send in their applications to the Court" (AJHR 1891, G–1, minutes, 50).

The same set of incentives was at work with more specialized kinds of land as well. Gold mining required expensive machinery, so in the gold mining district of Hauraki, Maori property owners leased their land to miners rather than mining the gold themselves. Whether or not it was in the local tribes' collective interest to enter into these leases—and it may not have been, as

mining would cause ecological damage interfering with Maori agriculture—the difficulty of collective action pushed them into leasing. Any individual owner could enter into a lease for the use of an entire collectively owned block. No individual owner could afford to refrain from leasing his land, for fear that it would only be leased by someone else (Hutton 1995:109, 143).

The costs of collective action had once prevented land sales. Now the British had used their lawmaking power to flip the structure of incentives the other way; now the costs of collective action promoted land sales. Maori land flooded onto the market, causing the price to plummet by the early 1870s (AJHR 1871, A–2a, 18). Each year, more and more land passed through the Native Land Court and became available for sale. By the late 1860s, the Court was ordering certificates of title to roughly three-quarters of a million acres per year—705,154 acres in the year 1867–68, and 791,988 acres in the year 1868–69. That pace would slacken in some years, to just over half a million acres in the year 1872–73, and to slightly under half a million acres in the year 1876–77, but it would generally hold steady at seven or eight hundred thousand acres per year, until sales began to slow in the 1880s (AJHR 1868, A–11; 1869, A–20; 1873, G–5; 1874, G–3; 1875, G–9; 1876, G–6; 1877, G–8, 1881, G–12). From 1865 through 1899, approximately eleven million acres in the North Island would be permanently transferred by purchase from the Maori to the British through the medium of the Native Land Court. Several million more acres would be temporarily transferred by lease through the same medium (Ward 1997; 2:248). The colonial government had successfully reconstructed the market.

C. Administrative Costs

By 1868, when it had been in operation for only two years, the Native Land Court was already so unpopular among the Maori that it had come to be called the "land-taking Court" (NZPD, 3:49). The complaints began pouring in. "It has now become known that many grievances exist," summarized former Chief Justice William Martin in early 1871, "and that the Court itself has come to be regarded by many of the most intelligent Natives with strong suspicion and dislike" (AJHR 1871, A–2, 3). Things would only get worse. The more the Court worked, the more hated it would become. "[F]rom my mixing with them I think they are all very much opposed to the Native Land Court," reported the surveyor John Gwynneth in 1891. "Nearly all the Natives I come into contact with speak against it" (AJHR 1891, G-1, 71).

The Court's judges sometimes accepted Maori public opinion with equanimity. "It is not to be expected that so complete a

revolution as is implied in the exchange of a communal and often disputed tenure . . . for one definite," reasoned Henry Monro, "could be carried out over so large an area as that of the North Island of New Zealand without some occasional hardships being inflicted upon individuals in its progress" (AJHR 1871, A–2a, 14). Chief Judge Francis Fenton was even more blunt: "[D]on't *let us deceive ourselves*," he wrote to Native Minister Donald McLean in 1871; "it is beyond the power of man to transfer the entire land of a country from one race to another without suffering to the weaker race" (Fenton 1871). When judges were not resigned to the unpopularity of their work, that tended to be because they did not perceive it. "[T]here is no need to endeavour to make the court popular," assured Frederick Maning in 1871, "it is highly so" (Maning 1871). When asked whether litigants resented paying court fees, Edward Puckey answered "Not so far as I know. They pay cheerfully" (AJHR 1891, G–1, 65).

The reasons for Maori displeasure with the way the Native Land Court functioned were numerous, but most were versions of the same complaint. The process of converting Maori property rights into tradeable form was proving very costly, and the Maori were bearing virtually all those costs.

That the process would be an expensive one was inevitable. In an undisputed case, conversion required at minimum a survey of the land and the time and attention of the claimants and court personnel. Even if all cases had been undisputed, ascertaining the title to millions of acres of land possessed by tens of thousands of people would have occupied tens of thousands of person-hours at the very least. Disputed cases could cause those costs to multiply very quickly. Some costs were, in this sense, inherent in the project. But many were not. As we will see, the particular design and staffing of the Native Land Court imposed substantial costs as well. The unavoidability of some costs, moreover, did not mean that the way those costs were allocated was also unavoidable. As we will see, the way the Court's proceedings were structured imposed nearly all the costs squarely on the Maori.

1. Error

The Native Land Court, critics agreed, often resolved disputed cases by confirming title in the wrong people (e.g., AJHR 1872, I–2). Any set of human beings called upon to make thousands of decisions will make some mistakes, of course, but errors seemed to be occurring at a rate higher than could reasonably be expected. Most of the cost of these errors fell on the true owners of the land, the Maori people who should have been awarded title. Some fell as well, in a more attenuated sense, on all Maori property owners in land not yet passed through the

Court, whose title was thereby rendered less secure. Some of the cost also fell on English purchasers who had arranged to buy land contingent on the Native Land Court's determination of ownership, who were likely to have financed the litigation. Repeat purchasers could compensate for these losses by offering lower prices; Maori sellers, as we will see, could not compensate by demanding higher ones.

Some of the error was doubtless attributable to corruption (Ward 1974:256). Government officials, including Native Land Court judges, bought and sold Maori land on their own accounts, a situation that on occasion must have produced at least the temptation to decide a case other than on the merits (Whitmore 1864; Fenton n.d.). Private purchases by government officials were a recurring source of scandal (Dalziel 1986:205–06). The Court's Maori assessors, assistants to the English judges, were also sometimes accused of benefitting personally from their decisions (Stirling 1980:74). There were occasional accusations that a litigant had bribed one of the judges or assessors (AJHR 1886, G–13). All told, however, corruption was most likely only a minor cause of error.

Error produced by corruption was almost certainly dwarfed by instances of error attributable to each of three other causes.

First, the officials who managed the process were much more interested in facilitating land sales to the British than ensuring that land was registered to its true Maori owner. When these goals came into conflict, the former was likely to prevail. The clearest example arose when the Native Land Court was called upon to interpret section 23 of the Native Lands Act of 1865, which stated that certificates of title could specify the names of persons or tribes, provided "that no certificate shall be ordered to more than ten persons." In conjunction with section 24, which authorized the Court to order more than one certificate for a single piece of land, section 23 was intended to mean that when there were more than ten owners, the Court should either register the land in the tribal name or subdivide the land so that no part of it was owned by more than ten people. Instead, the Court simply picked ten of the claimants and awarded the land to them, not as agents or trustees for the remaining owners, but as the sole owners. As Fenton suggested, this interpretation was "in furtherance of the great object of these laws, as declared in the preambles of the Acts of 1862 and 1865—namely, the extinction of the Native communal ownership" (AJHR 1871, A-2a, 41). Fewer individuals rather than more would facilitate sales, by giving purchasers fewer sellers with whom to deal. Limiting ownership to ten tribe members was a powerful means of promoting sales.

It was also, as many protested, an enormous intra-Maori transfer of land. In each tribe that put land into the Court, ten

people acquired legal title to land that had formerly been the property of hundreds or thousands. In many tribes, one official recognized, the ten "appropriated to themselves the whole or the greater part of the purchase money or rents, or have mortgaged the lands so deeply that, when sold, there was no residue to be divided amongst the outsiders" (AJHR 1871, A–2a,4). A petition of 554 former landowners in Hawke's Bay despaired that "the grantees acted toward the others interested as if they were persons out of sight and living at a distance" (AJHR 1872, I–2). The life's savings, so to speak, of thousands of people were wiped out. In Hawke's Bay alone, 569,000 acres belonging to nearly 4,000 people were vested in only 250 grantees (AJHR 1891, G–1, vii).

To its credit, Parliament responded quickly to the outcry, in the Native Lands Act of 1867, which specified that for blocks with more than ten owners the certificate could bear the names of only ten, but should also note that there were additional owners, and the names of these other owners should be registered in court (Stat., No. 43, § 17). The following year, however, in the first case in which the issue arose, Chief Justice Fenton interpreted the 1867 Act as providing the judges with the continued discretion to order certificates bearing the names of only ten people (AJHR 1871, A–2a, 41). Some of Fenton's colleagues on the Court did register the additional names (Gilling 1994:131, n. 63). By 1870, however, of the 1,769 certificates of title the Court had ordered in its first five years of operation, most of which probably related to land owned by more than 10 people, only 84 bore a notation that the land had more than 10 owners (AJHR 1871, A–2a, 50). The issue was eventually put to rest prospectively by the Native Lands Act of 1873, which simply instructed the Court to produce a document "declaring the names of all the persons who have been found to be the owners" without numerical limitation (Stat., No. 56, § 47). In the interim, a tremendous amount of land ended up in the hands of the wrong people, because Native Land Court judges were more interested in creating a land market than in distributive justice among the Maori.

A second source of error resided in what might be called judicial values. The men appointed to the Native Land Court were generally lawyers, who had grown accustomed to practice in English and colonial courts. Anyone working within an institutional framework for many years can, without reflecting or even noticing, come to internalize the institution's norms and accept them reflexively as worth upholding. Colonial judges tended to bring English norms into all colonial courts, not just the Native Land Court. But the Native Land Court was unusual in that its litigants were all Maori, most of whom were encountering English judicial values for the first time, and the Court was also unusual in that the disputes it was meant to resolve often involved not just a pair

of inconsistent claims but several. The resulting confusion was a fertile source of error.

One fundamental norm of English court procedure, for instance, was the principle that a judge should consider only the evidence presented in court in reaching a decision. The judge was understood to be barred from pursuing his own extra-judicial inquiries into the facts, and from engaging in out-of-court communication with the litigants. In ordinary disputes among the British, where all relevant interests—typically only two—could be expected to present evidence in court, the norm made a great deal of sense, as it provided some assurance of equal treatment to both sides. Native Land Court judges brought this norm into their work. "I never allow any Native to say one word to me on the merits of any claim until it comes before me in court," Maning asserted with pride. "[T]he result has been excellent. . . . [A]ll parties have confidence in the impartiality of the court" (Maning 1871). Attorney General Frederick Whitaker agreed. A judge of the Native Land Court, he urged, "should stand entirely free from communication with any of the parties to a suit until the matter comes before him for judicial investigation" (NZPD, 24:251).

In many cases, however, some of the owners of land were not present in court, either because they had not received notice of the proceeding or because the cost of attending court was too high (issues that are considered below). Often the claimants present in court were only a subset of the true owners, and sometimes they were not even the true owners at all. In such cases, the judges' failure to consider evidence other than that presented in court could prove ruinous to the missing. This was perhaps unavoidable sometimes, but what made it so galling to many Maori was that often the judges could have learned of the true state of ownership simply by broadening their inquiry a bit, to include a visit to the land or interviews with people who had not been formally called as witnesses, many of whom were in the courtroom watching. "I have myself gone to the Native Land Court, and sat there during the progress of a case, just to see how it went on," explained Mary Tautari, "and I have actually seen people who ought to have the land absolutely lose it" (AJHR 1891, G–1, 75). Whatever the value in other courts of the norm limiting consideration to in-court evidence, in the Native Land Court it looked like self-willed blindness, which advanced no goal besides awarding land to the wrong people. Wiremu te Wheoro, one of the Court's Maori assessors, complained in 1870 that

> with the present system of investigation, no matter where the land is, it is not inspected, and the land becomes the property of him who has made the most plausible statement; it goes, together with the houses and the cultivations which are upon it, to a stranger. In some cases, perhaps, the Judge of the Court

> has seen the cultivations and the houses, but he only pays attention to the statements made by the parties before him, and says that it would not be right for him to speak of what he has seen, but only to take what is stated in the Court. (AJHR 1871, A–2a, 29).

Te Wheoro resigned in disgust two years later.

Colonial officials soon realized the frequency with which the norm was producing mistakes and began to urge the judges to abandon it. "The functions of the officer who presides in a Native Land Court and those of a Judge in a Court of Law are so unlike as to be almost opposite," Edward Stafford argued. While a judge could afford to sit back and let the parties bring the facts to him, "the officer who presides in a Native Land Court has simply to find out the facts" without such severe procedural limitations (Stafford ca.1870s:5). Native Minister Donald McLean argued in the House of Representatives that "[s]ome of the Judges of the Court entertained, in practice, what he conceived to be a most vicious principle, viz., that of knowing nothing of matters of fact relative to the inquiries they were prosecuting unless they were actually brought to their notice within the precincts of the Court." As a result, he admitted, "in some cases the wrong persons would have titles conferred upon them" (NZPD, 14:604). In the Native Lands Act of 1873, McLean included a provision requiring the judges to make their own independent inquiries, before hearing the evidence, as to the ownership of the relevant land (Stat., No. 56, § 38). The judges were not pleased with such a direct assault on a cherished value. "[U]nder this section a judge would have the whole of his time taken up in travelling about the country making extra judicial and impertinent enquiries and collecting one sided and for the most part false evidence," fumed Maning, "which would only be calculated to warp his judgment when the case actually came into court" (Maning 1871).[3] Whitaker reported a few years later that the provision "has created a great deal of difficulty" for the Native Land Court judges. The preliminary inquiries normally began with the people who had submitted the claims, ex parte contact which, the judges believed, "creates a great deal of jealousy. If one of the parties to a suit in the European Courts were permitted to go before the Judge and make an *ex parte* statement the practice would be most thoroughly condemned," he concluded, "and that appears to me to be a principle which should equally apply to the Native Courts" (NZPD, 24:251). This resistance was enough to cause Parliament to amend the statute in 1878 to make the preliminary inquiry optional with the judges (Stat., No. 40, § 6). The procedure was rarely, if ever, used thereafter. The judges

[3] Maning's comments were made in 1871, on a draft of a bill that included a provision similar to the one eventually enacted in 1873.

continued to limit themselves to in-court evidence, and the erroneous awards of land mounted up.

Mistakes might have been relatively few but for a related judicial norm, that of finality. In English and colonial courts, once a decision had been reached it was final. It could not be reopened by non-litigants who had had the opportunity to participate in the case. Again, the norm made perfect sense in the traditional context of English litigation, where there were usually only two possible parties to any dispute and one could expect them to be present. And again, the judges brought the norm into the Native Land Court, where the number of potential parties to any dispute was unknown and there was no assurance that all were present. Many cases were resolved quickly as default judgments, when only one set of claimants showed up (e.g., Smith 1868). Once these decisions had been reached they were beyond reexamination, even if later claimants could have proven themselves to be the true owners. Again, the norm looked to many Maori like willful blindness. "[I]f a person did not appear in Court on the day fixed, the Crown grant would be issued to the person who made his statement in Court, even though it should be false, the Court could not upset it, seeing that no person appeared to object," Wiremu te Wheoro complained. "The land is gone through a man's absence, and it is lost through lies" (AJHR 1871, A–2a, 28).

This combination of judicial values—an insistence on considering only evidence formally presented in court, and a refusal to let absent parties reopen decided cases—when transplanted into the context of the Native Land Court produced a dismal set of incentives. Many Maori litigants quickly realized that if they testified unopposed at a hearing their evidence was likely to be credited and they would be registered as the owners of the land. Some were encouraged to file claims to land in which they possessed either no property rights or fewer rights than they claimed. Some were encouraged to give false testimony in court. It did not take long before everyone involved, British and Maori alike, lamented what seemed to be an epidemic of lying in the Native Land Court. "At a recent sitting of a Native Lands Court," James Mackay recounted in 1877,

> I heard a native misrepresenting a case which was within my personal knowledge; on his leaving the Court I expostulated with him on his conduct. He replied, "I was not giving evidence to you who knew the question, but to the Court who do not know anything about it," and doubtless there are numerous instances of the same class. (*New Zealand Mail*, 13 Oct. 1877, p. 10)

"The Maoris are less affected by the administration of the oath than Europeans are," believed Native Land Court judge Robert Ward (AJHR 1891, G–1, 130). Akapita te Tewe took a more prag-

matic view: "The evidence given on oath in the Court might be of some account," he remarked, "if God were present to chastise the man who lied; as it is there is no deterrent." He recognized that "it is the system pursued by the Court that affords encouragement to this sort of thing" (AJHR 1891, G–1, minutes 76).

Lying most likely increased as time went on. Part of the increase, as the former Native Land Agent William Moon pointed out, was due to the deaths of the older Maori men who had a better knowledge of tribal history and could rebut misstatements of fact (AJHR 1891, G–1, 73). Much of the rise in lying, however, was attributable to a change in appointments to the Native Land Court. The earliest judges were generally men with experience as land purchasers, who knew the Maori language and Maori property ownership practices. As John White urged in 1871, "the judges must be men who can enter into the witness's mode of thought, customs of life, and history, to arrive at a clear view of the case" (White 1871). By the later part of the century, the nature of appointments had changed. James Mackay charged in 1891 that "[a] great many of the appointments that have been made to it of late years have been of men who knew nothing at all about Native custom, and who could not speak Maori" (AJHR 1891, G–1, 43). The practice of law in ordinary courts was no preparation at all for the Native Land Court, where a knowledge of Maori life was the most important qualification. "The position of a man who presides in the Native Land Court without having a personal knowledge of the matters that are brought before him is extremely difficult," noted the solicitor Edwin Dufaur, who practiced in the Native Land Court in Auckland. "It is just like putting a civilian [i.e., an expert on civil law, as opposed to common law] on the Supreme Court bench, and asking him to decide the case put before him" (AJHR 1891, G–1, 79). As the judges became less and less informed about the subject of their cases, the chance of getting caught in false testimony doubtless decreased.

Lying was enough in itself to produce erroneous outcomes, but it may also have created error in a more diffuse way, by causing some of the Native Land Court judges to be extraordinarily hostile to the Maori litigants appearing before them. "I have just got back safe from Bedlam[;] those Rawara I have always considered to be just as great savages as they were in Captn. Cook's time," complained Frederick Maning. But he was plotting his revenge: "I shall however give them a lesson they don't expect[,] a sort of trick of my trade they have not taken into their speculations just yet" (Maning 1876a). Whatever the trick was, it was probably not conducive to a careful consideration of the merits of the case. Other judges felt the same way. One 1876 hearing degenerated into angry squabbling between Judge John Rogan and Chief Henare Potae over who was drunk more often, after Rogan unaccountably refused to let Potae give evidence on be-

half of his tribe's claim (Anon. 1877:25–26). Sitting in Ohaeawai, Judge Edward Puckey so feared being "at the mercy of the Natives" that when one litigant threatened to jump on a table Puckey abruptly adjourned the case to a nearby community (AJHR 1891, G–1, 65–66). Some of the judges developed a dislike for the litigants before them that could not have helped accurate decisionmaking.

Judicial values permeated the Court's decisionmaking, repeatedly causing English judges and Maori litigants to take divergent views of how cases ought to be managed. Although litigants valued oral testimony and unwritten arrangements, judges prized the written word, so much so that in one case, when the Ngaitahu complained that the government land purchasers' oral promises of schools and hospitals had remained unfulfilled, Fenton believed himself bound by the English common law's parol evidence rule and unable to consider promises "not contained or referred to in the Deed" (Fenton 1868). Even though litigants urged that cases could be decided more quickly and accurately if the judges rather than lawyers were to conduct the questioning, officials saw only the danger of the judge being placed "in the position of becoming a partisan" (NZPD, 24:251). When judicial norms clashed with the goal of ensuring that Maori land was registered to its true owners, it was often the norms that prevailed.

The third cause of error was simple carelessness, an utter lack of concern on the part of many judges, legislators, and other government officials as to which Maori claimants ended up owning land or receiving money. Carelessness could take many forms, any of which could be enough to wipe out someone's entire possessions. In 1875, Aria Hikurangi complained to the Napier newspaper *Te Wananga* (11 Dec., p. 423) that an apparent clerical error in the Native Land Court had caused a member of an entirely different tribe to be inserted in the grant to his tribe's land. An 1891 commission reported that "[i]n some cases the Government has omitted names of owners from grants. . . . Lands belonging to one hapu [subtribe] were awarded to another; names which should have been inserted were omitted" (AJHR 1891, G–1, xiii).

One of the more spectacular examples of inattention to detail came to light in 1880, when it was discovered that government land purchase officer John Young had been seizing land as payment for debts without bothering to examine whether the land was owned by the same people who owed the debts. The auditor who examined Young's accounts was astonished at their "utterly random character" and the "flagrant disregard for accuracy displayed in these transactions." But what made Young's conduct even more remarkable, he concluded, was that "there seems to have been no attempt on the part of Mr. Young to turn the inaccuracies in these cases to his personal advantage." Young

was careless, not corrupt. In fact, when Young was prosecuted for larceny, the court directed a verdict of acquittal, on the ground that although Young's accounts were no doubt fraudulent, there was no evidence that he had any idea of putting money in his own pocket. He simply did not care how land or money were distributed among the Maori (AJHR 1880, G–5, 14, 8, 23).

Carelessness was normally less sensational, but could have even greater effects. In the Native Lands Act of 1865, Parliament neglected to address the intra-Maori distributional issues that would inevitably arise when land was divided. The default rules of ordinary English property law accordingly applied. Individuals were all deemed to own equal shares, when in fact property rights within a tribe were often not equally distributed. This oversight would be corrected in 1869, but not for land already alienated. In the interim, a significant redistribution of property ownership had inadvertently occurred, from Maori owning above-average amounts of property to those owning below-average amounts. The 1865 Act had also failed to specify whether multiple owners would receive titles as joint tenants or tenants in common, the two main forms of concurrent ownership in English law. The difference was that at death the shares of tenants in common would pass to whomever they chose; the shares of joint tenants would pass to the surviving co-owners. In 19th-century English property law, the default rule was that co-owners would be deemed joint tenants. Children found themselves, to their surprise, unable to inherit the land of their parents. Joint tenancy exacerbated the effect of the 10-owner rule, because the death of one of the 10 would cause his share to be distributed among the remaining 9, and so on with later deaths, until the number of registered owners was even smaller and even less representative of all the true owners. Again, the oversight was corrected in 1869, but not until a substantial amount of land had been taken from some Maori and given to others (Native Lands Act of 1869, Stat. No. 26, §§ 12, 14).

Officials were sometimes so lax in publicizing Native Land Court hearings, when failure to attend would cause the forfeiture of an owner's rights, that they had to be reminded to distribute the notices they were given (Anon. 1875). After several erroneous default judgments caused by the failure of the true owners to receive adequate notice, Parliament moved to correct the problem in 1873, but the solution chosen was to require the applicants themselves to send a copy of their application "to each of the tribes hapus or persons named in the application, or believed by the applicants to be interested in any portion of the land comprised in the application" (Native Land Act of 1873, Stat. No. 56, § 35). This was not a likely way of flushing out potential opposition to a claim. It also imposed substantial additional costs on

the applicants. The following year, the House of Representatives received a petition bearing 5,500 Maori signatures, asking for a repeal of the 1873 Act. In one case, the petition showed, applicants had been required to serve notice to more than 2,700 people, with each notice written out, enclosed in an envelope, and delivered, before the Court could be allowed to sit (NZPD, 16:937). Such a burden would have been well beyond the means of many Maori landowners. Parliament quickly repealed the notice requirement (Native Land Act Amendment Act of 1878, Stat. No. 40, § 5). But that just left matters in the state they had been in before. Notice was published in the *Kahiti*, the Maori-language version of the official *New Zealand Gazette*, but actual notice depended on how aggressive public officials were in circulating the *Kahiti* in Maori communities, which were often located far from centers of English population. "[H]ow many European inhabitants were there who saw the *Gazette*?" asked Robert Hart on the floor of the House, clearly implying that very few did. "And how could they feel assured, therefore, that Natives who might be living at a distance of fifty, sixty, or seventy miles from the place of publication ever saw the notices[?]" (NZPD, 36:178). Wiremu Patene received a *Gazette* only to learn that his land was at that very moment the subject of litigation in another town; he immediately set off in a canoe and arrived just in time to save the land from being awarded to someone else. "[T]he *Gazettes* should be circulated more generally throughout the country," he concluded. "It often happens that men prefer claims to land in which they have no interest, and they deceive the Pakehas [Europeans] who are desirous of purchasing" (AJHR 1871, A–2a, 36). There was no way to be sure, before a claim was actually heard, exactly who needed to be notified. Notice was normally a matter of giving general publicity to a hearing rather than gaining the attention of any particular people. The attitudes of the individuals actually doing the notifying could thus matter a great deal.

Many colonial officials simply did not care very much whether one Maori individual or another received land. Frederick Maning, for instance, was appointed a judge of the Native Land Court at its creation in 1865 and served until 1876. Early in his judicial career he was already quite bitter about relations between settlers and the Maori. "The law is a sham," he argued in 1869,

> [T]he Government is a sham, the Parliament is a sham, we are all talking nonsense to one another and making believe we believe each other, everything and everybody is all a sham, and we shall live in a dreamland until we fairly conquer the rebel natives (meaning all of them) and when we are absolute masters of the country it will be time enough to talk of technical law and civilized justice. (Sorrenson 1955:231–32)

As a judge, his contempt for the Maori grew stronger as he came to resent the litigants before him. "The utter insolence and barbaric ignorant overweening conceit of these Maori brutes," he complained to future Native Land Court Judge Spencer von Stürmer in 1872. "[U]ntil you can make a tiger live on hay you can make nothing of the Maori, but a mean, treacherous, vain, lying and dangerous roudy, cunning as Satan and dangerous as the serpent." Land litigation, in his view, required him to "run about at the beck and call of Maori brute beasts" (Maning 1872a; 1872b; 1872c). Sitting in Hawke's Bay in 1873 he reported "stolid ignorance, pampered, truculent, conceited barbarism, hungering and thirsting for our wealth, too lazy to labour to create wealth for themselves, envying us, hating us, but fortunately, to a certain degree, fearing us" (Maning 1873a). "I have been in bedlam for a couple of weeks," he complained in 1867, "suffering the tortures of Maori litigation" (Maning 1867). He continually longed to "get rid of this Land Court trade as soon as I conveniently can," to escape "all the time wading through a mass of quarrelling, lying, cheating, and always liable to be deceived and do something wrong" (Maning 1872d). But Maning lasted over a decade on the Native Land Court, miserable all the while: From Napier in March 1873, "[T]he fact is it is killing me"; from Waitangi in July 1873, "I am allmost at my wits end, and do not know how I shall ever pull through this court" (Maning 1873b; 1873c); and in 1876, at the end of his career, "I am thoroughly sick of these Maori schemes having had enough of them the last ten years" (Maning 1876b). Looking back on his service on the Court, Maning concluded that the Maori were "d[amne]d Canibals who are scarcely done picking human flesh out of their teeth. . . . It is absolutely useless to even think of doing anything for them[;] they are past all help" (Maning 1879a; 1879b).

This was not the ideal state of mind in a man with the responsibility of determining which Maori tribes and individuals owned which land. While there is no indication that Maning awarded titles on any basis other than his sincere assessment of the evidence, it is hard to imagine that he could have put all his disgust for the Maori and his hatred of his own job aside and devoted careful attention to the merits of each claim. Maning may have been extreme in the vituperativeness of his private correspondence, but many officials most likely shared his indifference to issues of justice among Maori. For this reason, issues of the greatest importance to the Maori could be decided in the most casual, offhand way. Mistakes accordingly proliferated.

Most of these countless errors—caused by the desire to facilitate land sales, the importation of familiar judicial values into the unfamiliar context of the Native Land Court, and simple carelessness—were not the result of malice on the part of Native Land Court judges or other government officials. With rare excep-

tions, the managers of the process were not profiting personally from the mistakes. Error in the Native Land Court did not normally benefit the British at the expense of the Maori; it typically caused some Maori to gain a windfall at the expense of others. Officials were not hostile to individual Maori so much as they were indifferent to the Maori in general. In this respect they were representative of the voters they served, most of whom had few interactions with the Maori (Fairburn 1995:18). If one Maori person rather than another ended up with a piece of land, few in power were likely to get upset.

In the short run, the loss to the true owner was offset by the gain to the person wrongly awarded the land. But over time, the accumulation of errors almost certainly reduced the income the Maori overall received for selling land. When the likelihood of error encouraged non-owners or partial owners to make arrangements to sell land, they had less of an incentive to hold out for a better price than would a true owner, secure in his right, because of their need to push the land through the Native Land Court before the truth was discovered. The likelihood of error would have caused a rational purchaser to offer less for land to compensate for two risks: first, that after making preliminary expenditures the land would be awarded to someone else and he would be unable to buy it; and second, that after buying it he would discover that his vendors had not been the true owners, which would not necessarily disturb his own title but could cause him (from his perspective) to suffer harassment from a competing group of Maori, who had no other means of redress. As security of ownership diminishes, so too does the value of what is owned. In this way, the mistakes of the Native Land Court imposed costs on the Maori generally.

2. Distance and Time

Error was an indirect cost, but the Native Land Court imposed direct costs on the Maori as well. Foremost among these were the costs of attending the Court itself.

Native Land Courts were typically held in English population centers, which could be far from the Maori communities in which the litigants and witnesses lived. "[A]t the late sitting of the Land Court here" in Gisborne, Resident Magistrate James Booth informed the Native Department in 1884, "many applicants came from distances ranging up to a hundred miles" (AJHR 1884, G–1, 17). Wiremu Pere complained that the Court sat in Cambridge, the nearest colonial town of any size, to consider land owned by people in "Taupo and Rotorua, and other distant places," requiring them "to come a long distance to attend sittings of the Court" (AJHR 1891, G–1, 9).

Distance alone might not have been a serious problem had the Court been able to resolve cases quickly. But sittings of the Court often lasted several months. Cases could involve the testimony of scores of witnesses, each of whom had to provide a long account of tribal history and genealogy. When a case had multiple groups of claimants, each group would cross-examine each witness, which could cause delay to expand exponentially. "[T]he Court has been sitting for the last five months," reported one spectator in 1883, "and has not yet settled a single question" (Peek 1883). The solicitor Edwin Dufaur blamed the government's method of paying the judges in part according to the number of days they spent in court. "[W]hile the judges are getting a guinea a day maintenance-money," he argued, "they will be content to let things go on in the fashion I speak of. . . . Look at the Court at Marton. It has been sitting since June last, and will continue to sit until the Natives are sucked dry" (AJHR 1891, G–1, 78). Equally serious from the perspective of Maori litigants and witnesses traveling to Court sittings was the Court's standard practice of accumulating many cases for a single sitting but not setting any schedule for their hearing, which required each participant to attend the entire sitting to be sure he would be present when his case was called. "[T]he Natives congregated at the opening of the Court have to remain weeks or months even without a chance of their business being earlier reached," explained J.E. MacDonald, Fenton's successor as Chief Judge. At one sitting, "arrears of seven years I believe were gazetted at once" (AJHR 1883, G–5, 2). Even a simple uncontested case that could be resolved in a day often required attendance at Court, far from home, for several months.

Because Court sittings were scheduled without reference to the agricultural calendar, attendance often required large numbers of people to be away from their land during critical seasons. An entire year's crop could be lost (Monin 1995:208). Probably even more costly was the need for food and lodging for several months while attending Court. One often heard of cases in which such "expenses were so great that the value of the land was absorbed in the outlay incurred attending the sittings of the Court. A company that supplied the Natives with provisions charged for it, and the amount they had to pay equalled the value of the land" (AJHR 1891, G–1, 9). The land purchaser John Lundon recalled that "[t]he first Court held at Hokianga lasted three months during which time the Natives were kept hanging about the place, and, although they were paid £13,000 for their land, they went away without their money." Because of the cost of food and lodging, "they lost the money and lost the land, and were worse off therefore than when the Court began" (AJHR 1891, G–1, 88). In Cambridge, which hosted at least several hundred visiting Maori litigants every year, "the meanest

house or stable has let readily for £3 a week throughout the time that the Native Land Court has been sitting," MP Joseph Ivess reported. "Residents in that district look anxiously for the coming-round of the Native Land Court, because they regard it as their harvest" (NZPD, 46:124).

Waiting around English cities with nothing to do, living in boardinghouses and shantytowns, subsisting on advances at high rates of interest from the English purchasers of their land, Maori property owners watched the proceeds of their land gradually slip away. Many turned to alcohol, and it became a commonplace in the colonial press that the advances made by land purchasers "mostly went for rum of the very worst kind, and the whole time of the sitting of the Court was spent by the natives—men, women, and children—in drunkenness and debauchery" (*New Zealand Herald*, 2 March 1883, p. 4). Unhealthy living conditions and, for many, initial exposure to European disease caused horrible health problems in the temporary Maori communities that sprang up for Court sittings. "[T]here has been a considerable amount of sickness in places where they have been temporarily crowded in tents," observed one government official in 1881 (AJHR 1881, G–8, 4). "[E]specially during the Land Court," another reported a few years later, "there have been an exceptional number of deaths" (AJHR 1886, G–1, 16). Expectations grew so dire that one official could find it remarkable in 1887 that "notwithstanding that the Court sat continuously through four months of a most boisterous and inclement winter, and that nine-tenths of the Natives attending Court were living in tents the whole of the time, there was not a single case of death or severe illness among them" (AJHR 1887, sess. II, G–1, 5). Where the Court sat, the Maori population dropped the fastest (Sorrenson 1956).

Occasional voices were raised within the government, and by those with the stature to influence the government, concerning the effects of distance and delay. As to distance, William Martin urged as early as 1865, "Instead of bringing the Natives to our Courts of Justice, we must carry our Courts to them" (Martin 1865:8). R.W. Woon, the Resident Magistrate in Wanganui, suggested that the local tribes would greatly prefer "the Court to sit in their midst, where they could more easily and more cheaply procure food, and obtain house accommodation" (AJHR 1880, G–4, 15). As to delay, officials sometimes complained that Native Land Court judges "have not shown that efficiency which they ought to display" (NZPD, 35:221). In 1890, Chief Judge H.G. Seth-Smith proposed saving time in individual cases by requiring all claims and counterclaims to be made in writing. Judge Alexander Mackay thought time could be saved if the parties were compelled to confer before the hearing and narrow the issues to be tried (Seth-Smith 1890; Mackay 1890). Fenton conceded that

"[i]t seems a great pity to summon every body to attend at a certain day, when their cases may not come on for a month." He considered some possible alternatives. One might schedule groups of cases for each week, numbers 1 to 20 the first week, 21 to 40 the next week, and so on, "but it may have objections: then claimants in No. 2 may be claimants or opponents in number 100." Or one might have everyone attend on the first day, and then work out the order in which the cases would be heard, "so that people may return to their homes and come again" (Fenton n.d.). Nothing ever came of any of these speculations.

The absence of any reform was due in large part to the Native Land Court judges, who were adamant in their defense of the Court's practices. "It would be impossible for the Court to go and sit at every Native village," Edward Puckey asserted (AJHR 1891, G–1, 65). Requiring the Court to hear claims near the land under adjudication, Maning argued, "would be to go as far as possible to insure a one sided investigation and often a wrong decision" (Maning 1871). One might reasonably suspect that the judges preferred the comfort of European-style hotels and restaurants, a luxury that would have been lost by sitting in Maori rather than English population centers. If the Court moved slowly, explained Chief Judge J.E. MacDonald, that was because "the investigation of Maori tribal titles to land, is of necessity a work of time and patience, owing not only to the vague origin and nature of such titles, but to the character of the evidence by which they are sought to be established, being assertion mostly legendary" (AJHR 1883, G–5, 1). Seth-Smith agreed; it simply took a long time to resolve claims "based on ancestral rights, known only by tradition," a problem exacerbated by the tendency of the witnesses to lie (AJHR 1891, G–1, minutes, 91). There was no way to get around the need to schedule large numbers of cases for single sittings, Maning insisted. "Many claims must be heard at the same time and place or the business could not be got through at all" (Maning 1871).

The lack of reform was also due to a lack of interest among most colonial officials and most colonists. "The working of the Native Lands Court has been a scandal to contemplate for many years past," the *New Zealand Herald* (2 Mar., p. 4) noted in 1883, "but as the chief sufferers were the Maoris, nobody troubled themselves very much." Some means of scheduling cases along the lines suggested by Fenton would probably have succeeded in reducing the immense costs of attending Court, but it would have required some additional administrative time and effort, so it was never attempted. Making the Court more mobile, so that it sat for short periods near the land it was considering, would also have been successful, but it would have imposed costs on the judges in terms of travel time and living standards, so it was never

attempted either. As a result, the costs to the Maori simply of attending Court drained away much of the value of their land.

3. Fees

Using the services of the Native Land Court also imposed significant costs. The Court itself charged fees for everything it did, from ordering certificates of title to hearing witnesses, the most significant of which was the £1 it charged each litigant for each day his case was being heard (Anon. 1880:12–13). In this respect it was identical to the other courts in New Zealand and elsewhere in the British empire, which charged comparable fees to litigants (Anon. 1865:106-7). The Native Land Court was unusual, however, in that all the litigants before it were Maori, and most had very little money. A pound per day was often enough to prevent a litigant from being heard, which could cause land to be erroneously awarded to his opponent (AJHR 1891, G–1, 9, 17). The fee was imposed on all parties, including those attending Court solely to oppose an application filed by someone else, for each day their case was before the Court, whether or not they actually spoke that day (AJHR 1891, G–1, 21). When a single case lasted weeks or months, the fee mounted. Many understandably resented the ability of a claimant, even one filing a claim lacking any merit, to impose substantial costs on the land's true owners. "They go according to the call of the *Gazette*, when the pound is thrown at them" wrote Hone Mohi Tawhai in 1871, "so the thoughts of the people get wearied by reason of the fear of that pound" (AJHR 1871, A–2a, 30).

If Court fees were too high for many Maori, they were too low for many legislators, who found it intolerable that the Native Land Court was not self-sustaining. "[T]he expenses of the Court exceeded the revenue of the Court by a very considerable sum indeed," reported Native Minister John Bryce in 1880 (NZPD, 37:49). The shortfall was taken from general tax revenues. Some proposed financing the Court by taxing its users, or in effect drastically raising its fees. In the Legislative Council, William Reynolds "did not see why there should not be a special tax levied upon Native land, as the owners of Native land were the only parties who benefited by the Native Land Courts" (NZPD, 36:276). In the House, William Speight wondered "why should not the Natives pay for the cost of it directly out of the land which was put through the Court?" (NZPD, 36:563). The result was a stalemate; fees were neither lowered nor raised to any significant extent.

Court fees were in any event very small compared to the other kinds of fees Maori litigants had to pay in order to make use of the Native Land Court. Title could not be obtained without first having the land surveyed. In forest or scrub, that meant

cutting and clearing boundary lines four feet wide (Anon. 1880:9). The judges recognized right away that, as Fenton put it in 1867, the "great difficulty in the rapid conversion of the Maori titles and the individualization of holdings is the necessity and expense of surveys" (AJHR 1867, A–10, 5). Surveying costs were large enough, Judge W.B. White explained, to prevent many cases from being brought at all (AJHR 1867, A–10, 10). The cost per acre rose the smaller the block surveyed, which made subdividing a tribal holding into individual plots proportionally much more expensive than delineating the outer boundaries of the tribal holding in the first place, and this accordingly deterred applications for subdivision (AJHR 1867, A–10, 8).

Because Maori property owners typically could not pay surveyors until they had sold some of the land being surveyed, surveyors of Maori land faced delays and risks of nonpayment that they did not normally face when surveying for English clients, and the prices charged to the Maori accordingly tended to be higher. Surveyors ran the risk that their clients would lose in the Native Land Court, in which case they would be unable to pay for the survey. When their clients won, surveyors obtained a lien on the land, but if they were not paid the ability to go after the land was not much of a substitute. As Charles Heaphy explained in 1871, "[F]ew surveyors can afford to have undefined landed estates scattered about where they may have been working" (Heaphey 1871). The Court's long delays had an adverse impact on the surveyors as well as Maori landowners. Surveyors themselves were forced to obtain advances at steep discounts from prospective land purchasers, the cost of which they then tried to recoup from their clients (AJHR 1871, A–2a, 10). All these uncertainties raised the price of surveying. The result was a vicious circle: the inability of many Maori landowners to pay surveyors raised the price of surveying to all Maori landowners, which in turn caused even more to be unable to pay surveyors.

Another necessary fee, and one which could easily exceed those paid to the Court and to the surveyor, was that paid to a lawyer. In disputed cases it quickly became the norm for each side to employ a lawyer, to counter the lawyer employed by the other. Maori litigants and Court officials repeatedly asked the government to ban lawyers from appearing. "[T]he lawyers know nothing whatever about the titles of Maoris to land," Wiremu te Wheoro argued, "[I]t would be by far the best plan to let the Maoris prove their titles themselves. Large sums of money are needlessly spent upon lawyers" (AJHR 1871, A–2a, 28). In 1873, Parliament therefore required the Court's judges to examine witnesses directly, "without the intervention of any counsel or other agent" (Native Land Act of 1873, Stat., No. 56, § 44). Five years later, however, after protests from the judges, who felt ill at ease performing what they perceived to be an advocate's

role, Parliament authorized the Court to allow counsel to appear (Native Land Act of 1873 Amendment Act of 1878, Stat., No. 1, § 3). Lawyers again became the norm. The same Court delays that built up the costs of food, lodging, and court fees also built up the costs of lawyers, who typically charged by the hour or the day (e.g., Buller 1879). Lawyers, many charged, had the incentive and the ability to prolong cases in order to increase their fees. "The European purchaser from one section arranged to have a lawyer in Court," as a newspaper described one case, "and the contending section, who were also backed up by a European, had another lawyer. These learned gentlemen were paid by the day, and of course it was in their interest to make the case spin out as long as possible" (*New Zealand Herald*, 2 Mar. 1883, p. 4). As with the other costs, lawyers' fees had to come out of the proceeds of the land when it was sold (AJHR 1891, G–1, 47).

4. Incidence

Virtually all these administrative costs—for lawyers, surveyors, and court fees; for several months of food and lodging far from home; and for the not insignificant risk that after all one's effort one's land would be awarded to someone else—fell in the first instance on the Maori owners of the land being passed through the Native Land Court. That need not necessarily have meant that the owners ultimately bore those costs. The administrative costs associated with the Native Land Court were analogous to a very high sales tax, imposed on the seller. Other sales taxes, and indeed many of the costs faced by a seller, are routinely passed on in large measure to the purchasers of whatever is being sold, in the form of higher prices. Contemporary observers of the Native Land Court, however, believed that the Maori bore all the cost of obtaining transferable titles. "Commercially speaking," explained Native Minister John Bryce, "I should say it would in all cases fall upon the owners of the soil." When it did not, Bryce reasoned, it was because the buyers "are not working on sound commercial principles" (NZPD, 45:458). "The Natives suffer in consequence of this excessive cost," agreed Resident Magistrate George Preece, "as they get a smaller price, or a smaller amount of rent, as the case may be, owing to this expense of obtaining a title" (AJHR 1891, G–1, 115).

Why were the Maori unable to pass these costs on to English land purchasers? Between a buyer and a seller of an item, the incidence of a tax depends on their relative abilities to find a substitute for that item. The more easily a buyer can buy something else instead, the more he will be able to force the seller to bear the ultimate burden of the tax; the more easily the seller can sell something else instead, the greater the burden forced on to the buyer. The Maori had no substitute. All they owned was

land. Whatever the administrative cost of selling it, they had to sell it if they wanted to sell anything. The British, on the other hand, had an excellent substitute. Between 1840 and 1865, the colonial government had purchased over 30 million acres of land. For the rest of the century and beyond, most of it was for sale or lease. As the Secretary of Crown Lands proudly reported in 1882, the government owned 33 million acres, "or, after deducting 9,000,000 acres of mountain tops, lakes, and barren country," 24 million acres (AJHR 1882, C–1, 1). The government sold hundreds of thousands of acres every year. Prices depended on the location of the land – land in towns cost much more than land in rural areas – but most of it was "country" land, and nearly all of that sold for under £2 per acre.[4] One piece of land is never a perfect substitute for another, of course. Some land was more suitable for farming than other land. Location was obviously crucial: "the situation of land," observed the colonist Francis Fuller, "enters largely into all considerations respecting its value" (Fuller 1859:60). But land purchased from the government was very close to a perfect substitute for land purchased from the Maori. In land sales, the government was the Maori's greatest competitor. For most of the century, the price charged by the government was often low and the terms of payment typically generous, in order to encourage settlement (Hawke 1985:25; Arnold 1981:92-93; Hamer 1988:69). That price became an effective ceiling on the price the Maori could charge. It was competition from the government, the same government that was imposing all the administrative costs in the first place, that prevented the Maori from passing those costs on to English purchasers.

The sum of the administrative costs associated with the Native Land Court often amounted to a significant fraction of the value of the land, and sometimes to all of it. Maori landowners face "so many expenses, the money goes and so does the land," Wiremu te Wheoro wrote to Donald McLean. "Behold there is the survey one, the Court two, the Lawyers three, the Native Interpreters four, the Crown Grant five and the giving of the land to the other side" (Wheoro 1871). By the end of the process, the value received by Maori property owners was much less than the value of their land to its purchasers.

III. Ideology

Once land left Maori ownership, it entered a real estate market constructed according to different rules, which produced much higher land values. The MP James Parker Joyce pointed

[4] Acreages and prices of "Waste Land Sales" are reported annually in the AJHR, usually at C–1. Figures for 1866–69 are in 1870, C–3; for 1870 in 1871, C–5a; for 1871 in 1872, C–3; for 1877 in 1878, C–2; and for 1880 in 1881, C–3.

out that North Island property "passes from the Natives, in some cases, for less than they would get for a year's rental in the South for land of inferior quality" (NZPD, 46:128). Some of the disparity in value between the two markets represented savings to the government as land purchaser, and some of those savings were passed onto the settlers buying land from the government, which enabled white New Zealanders to own land in large numbers. By the end of the century, approximately half of all adult males in New Zealand owned land, a figure much higher than in England or Australia, the biggest sources of emigrants (Fairburn 1989:92-93). Part of the disparity in value between the two land markets thus enabled many settlers to gain a higher standard of living. More and more of the Maori meanwhile, without their former land but also without much to show for it, were becoming landless rural laborers (Denoon 1983:224). But value could be a malleable concept when applied to land for which there had been no market before the British arrived. "If the European race had never come into these seas, the value of these islands would still be only nominal," Fenton argued. "The immense value that now attaches to these territories is solely to be attributed to the capital and labour of the European" (AJHR 1876, G–7, 4). The fraction of land retained by the Maori, pointed out the Reverend James Buller, is "worth immeasurably more than the whole island was forty years ago" (Buller 1878:406). In this light, English land purchasing had been a net gain to the Maori. They had no cause to complain.

Some Maori losses over the course of the 19th century were caused by outright fraud by the English. Some were caused by an inability to bargain as well as the English. Some sellers frittered away the proceeds. But much of what the Maori lost in the 19th century cannot be attributed to the actions of individuals, whether sharp practice by buyers or imprudence by sellers. Those losses were due instead to the structure of the market in which buyers and sellers operated. There is no way to calculate the relative magnitude of each cause of loss, because that would require a case-by-case accounting of each transaction, and in each case one would have the theoretically impossible task of constructing the non-existent baseline of a "neutral," or "free," market and then estimating what the land's value would have been in the market so constructed. But even if we cannot apportion relative causal weight between the market and its occupants, we can at least recognize that the occupants do not bear all the blame; some belongs to the market itself.

The market looked the way it did, of course, because the British were powerful enough to design it and to rebuff Maori efforts to impose a different structure. That power rested on the military and technological superiority that allowed European states to colonize much of the world rather than vice versa (Headrick

1981). The British had the muscle to make the rules—to select exactly which property rights they would enforce, and exactly how they would be enforced. Military power is expensive to use, however, and it leaves a bitter taste long afterwards, sometimes even for the winner. The power to determine the structure of the Maori land market allowed the British to impose their will without actually having to use force except in rare circumstances. The threat of conquest was mostly kept in the background, behind the screen provided by the concept of a free market, often out of sight of both the Maori and the English themselves. A colonial official could sincerely feel good about the enlightened, humanitarian method of colonization in which he was participating, one in which land was not taken by arms but purchased on the open market.

The concept of a free market has served as an ideological screen for historians as well, in a slightly different sense. Looking at the Maori in 1800 and again in 1900, it is clear that something went terribly wrong. Historians sympathetic to the Maori have assumed the causes lay in the behavior of individuals, and have scoured the record of 19th-century land transactions in search of British fraud and Maori misunderstanding. An exclusive focus on individual conduct would make sense if the Maori land market had been a free market in the popular sense—an arrangement to which the only alternatives would have been structures other than a free market.[5] But failing to recognize that a free market is an infinite variety of structures rather than one can lead to two kinds of error.

First, in wrongly conceiving of a market as something natural, something free, something not constructed by law, we may unconsciously accord it a privileged position above other humanly created institutions. (We talk of "intervening in the free market," but we never talk of "intervening in the free small claims court," when in fact both are institutions structured by law, and one is no more free than the other.) We risk forgetting that a market takes on whatever features its creators endow it with, and we accordingly risk assuming that it does not exhibit a preference for one group over another. When we make this kind of error, we can mistakenly ascribe a group's losses to natural forces rather than to the decisions made by individuals. No one's fault, we think; that's just the way the market worked. In fact, while the forces operating within a market may sometimes be usefully considered "natural," in the sense that they represent the sums of the collective behavior of large numbers of people rather than the identifi-

[5] To be fair, much recent work has been paid for by the government of New Zealand, as research directed at resolving litigation in the Waitangi Tribunal arising out of 19th-century sales. The terms on which historians have been engaged, about which I know nothing, may have encouraged them to inquire into the misconduct of individual government officials rather than systemic market issues.

able choices of a few, the structure of a market unleashes and channels those forces in predictable ways, and that structure often *is* willed by identifiable people. The deceptive naturalness of a market screens the choices made by its constructors from the perception of the historian.

Second, when we mistakenly believe that there is only one kind of free market, we lose sight of the alternatives that were available at the time under examination. One of the most knowledgeable and distinguished historians of New Zealand has recently written, with reference to the market in Maori land in the second half of the 19th century, "Then, as now, the market economy worked against Maori interests" (Binney et al. 1990:144). But there is, and was, no such monolith as "the market economy." There was an infinite number of equally free possible market economies in Maori land in the 19th century. It was not "the market" that hurt the Maori, or even the colonial government's decision to set up a market; it was the government's set of choices among the multiple markets available. Some of the choices were quite intentional (as with the definition of buyers and sellers) and some were mostly inadvertent (as with the allocation of administrative costs). With a different market economy, the Maori might have realized much higher prices for their land. They might have earned more money and perceived the need to sell less land. Patterns of landholding and wealth allocation might look very different in New Zealand today. The choices made as to how the market would be constructed hurt the Maori more than the actions of any single person operating within it, and maybe even more than the actions of *all* the people operating within it, although there is no way to know for sure. In not thinking clearly about markets, we can miss seeing this.

References

Adams, Peter (1977) *Fatal Necessity: British Intervention in New Zealand 1830–1847.* Auckland, N.Z.: Auckland Univ. Press.

AJHR (*Appendix to the Journal of the [New Zealand] House of Representatives*).

Anon. (1863) Translation of material appearing in *Te Hokioi*, MA 1/2/63/69, National Archives, Wellington, N.Z.

Anon. (1865) *The Wellington Almanack and Diary for the Year of Our Lord 1865.* Wellington, N.Z.: M'Kenzie and Muir.

Anon. (1874) "Proceedings of Native Meeting Held at Thames on 11th & 12th of December 1874," MS-Papers-2520, Alexander Turnbull Library, Wellington, N.Z.

Anon. (1875) Circular, MA 6/1, 291, National Archives, Wellington, N.Z.

Anon. (1877) *How the Native Land Court and Land Purchase Department Behave on the East Coast: A Series of Letters from an "Occasional Correspondent" to "The Otago Daily Times."* Auckland, N.Z.: William Atkin.

Anon. (1880) *General Rules of Native Land Court.* Wellington, N.Z.: G. Didsbury.

Arnold, Rollo (1981) *The Farthest Promised Land: English Villagers, New Zealand Immigrants of the 1870s.* Wellington, N.Z.: Victoria Univ. Press & Price Milburn.

Bagnall, A.G. (1982) "No Known Copy? T.S. Grace's Suppressed Circular, W264," 15 *Turnbull Library Record*, 77–92.

Belgrave, Michael (n.d.) *The Recognition of Aboriginal Tenure in New Zealand, 1840–1860.* WAI 45/G4. Wellington, N.Z.: Waitangi Tribunal.

Belich, James (1996) *Making Peoples: A History of the New Zealanders.* Auckland, N.Z.: Penguin.

Bentham, Jeremy (1843) *The Works of Jeremy Bentham.* Edinburgh: William Tait.

Binney, Judith (1995) *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki.* Auckland, N.Z.: Auckland Univ. Press.

Binney, Judith, Judith Bassett, & Erik Olssen (1990) *The People and the Land: Te Tangata me Te Whenua: An Illustrated History of New Zealand 1820–1920.* Wellington, N.Z.: Allen & Unwin.

BPP (*British Parliamentary Papers: New Zealand*). 1968–70. 17 vols. Shannon: Irish Univ. Press.

Brooking, Tom (1996) *Lands for the People? The Highland Clearances and the Colonisation of New Zealand: A Biography of John McKenzie.* Dunedin, N.Z.: Univ. of Otago Press.

Buddle, Thomas (1860) *The Maori King Movement in New Zealand.* Auckland, N.Z.: "New Zealander" Office. Reprint, New York: AMS Press, 1979.

Buller, James (1878) *Forty Years in New Zealand.* London: Hodder & Stoughton.

Buller, Walter (1879) Bill at end of record for Otamakapua case, qMS-1613, Turnbull Library, Wellington, N.Z.

Burns, Patricia (1989) *Fatal Success: A History of the New Zealand Company.* Auckland, N.Z.: Heinemann Reed.

Busby, James (1859) *The Pre-emption Land Question.* Auckland, N.Z.: Richardson and Sansom.

Butterworth, G.V., & H.R. Young (1990) *Maori Affairs: A Department and the People who Made It.* Wellington, N.Z.: Iwi Transition Agency.

Chamerovzow, Louis Alexis (1848) *The New Zealand Question and the Rights of Aborigines.* London: T.C. Newby.

Clarke, George (1846) *Extracts from the Final Report of the Chief Protector of Aborigines in New Zealand.* Auckland, N.Z.: n.p.

Condliffe, J. B., & W.T.G. Airey (1960) *A Short History of New Zealand.* 9th ed. Christchurch, N.Z.: Whitcombe & Tombs.

Cowie, Dean (1996) *Hawke's Bay (Rangahaua Whanui Series, District 11B).* Wellington, N.Z.: Waitangi Tribunal.

Daamen, Rose, Paul Hamer, & Barry Rigby (1996) *Auckland (Rangahaua Whanui Series, District 1).* Wellington, N.Z.: Waitangi Tribunal.

Dalziel, Raewyn (1986) *Julius Vogel: Business Politician.* Auckland, N.Z.: Auckland Univ. Press & Oxford Univ. Press.

Davies, William Evan (1931) *The English Law Relating to Aliens.* London: Stevens & Sons.

Denoon, Donald (1983) *Settler Capitalism: The Dynamics of Dependent Development in the Southern Hemisphere.* Oxford: Clarendon Press.

Evison, Harry (1993) *Te Wai Pounamu: The Greenstone Island: A History of the Southern Maori During the European Colonization of New Zealand.* Christchurch, N.Z.: Aoraki Press.

Fairburn, Miles (1989) *The Ideal Society and Its Enemies: The Foundations of Modern New Zealand Society 1850–1900.* Auckland, N.Z.: Auckland Univ. Press.

——— (1995) *Nearly Out of Heart and Hope: The Puzzle of a Colonial Labourer's Diary.* Auckland, N.Z.: Auckland Univ. Press.

Fenton, Francis (1868) Letter to Native Minister, 3 July, LE 1/1868/130, National Archives, Wellington, N.Z.

——— (1871) Letter to Donald McLean, 12 Aug., MS-Copy-Micro-0535-052, Turnbull Library, Wellington, N.Z.

——— (n.d.) Letter to Donald McLean, MS-Copy-Micro-0535-052, Turnbull Library, Wellington, N.Z.

Fitz-Roy, Robert (1846) *Remarks on New Zealand.* London: W. & H. White. Reprint, Dunedin, N.Z.: Hocken Library, 1969.

Flight, Josiah (1857) Letter to Donald McLean, 9 Apr., MS-1319, 97, Turnbull Library, Wellington, N.Z.

Fuller, Francis (1859) *Five Years' Residence in New Zealand: or, Observations on Colonization.* London: Williams & Norgate.

Gilling, Bryan D. (1994) "Engine of Destruction? An Introduction to the History of the Maori Land Court," 24 *Victoria Univ. of Wellington Law Rev.* 115–39.

Goldsmith, Paul (1996) *Wairarapa (Rangahaua Whanui Series, District 11A).* Wellington, N.Z.: Waitangi Tribunal.

Grindell, James (1857–58) Journal, qMS-0891, Turnbull Library, Wellington, N.Z.

Hale, Robert L. (1923) "Coercion and Distribution in a Supposedly Non-Coercive State," 38 *Political Science Q.* 470–79.

Halse, Henry (1857) Letter to Donald McLean, 31 Aug., MS-1319, 166, Turnbull Library, Wellington, N.Z.

Hamer, David (1988) *The New Zealand Liberals: The Years of Power, 1891–1912.* Auckland: Auckland Univ. Press.

Hawke, G. R. (1985) *The Making of New Zealand: An Economic History.* Cambridge: Cambridge Univ. Press.

Headrick, Daniel R. (1981) *The Tools of Empire: Technology and European Imperialism in the Nineteenth Century.* New York: Oxford Univ. Press.

Heaphey, Charles (1871) Memorandum, 15 Apr., MA 13/2c, National Archives, Wellington, N.Z.

Hutton, John Lincoln (1995) *Troublesome Specimens: A Study of the Relationship Between the Crown and the Tangata Whenua of Hauraki 1863–1869.* M.A. Thesis, Univ. of Auckland.

Kennedy, Duncan (1985) "The Role of Law in Economic Thought: Essays on the Fetishism of Commodities," 34 *American Univ. Law Rev.* 939–1001.

Mackay, Alexander (1890) Letter to H.G. Seth-Smith, 15 Nov., MLC 8/2, National Archives, Wellington, N.Z.

Maning, Frederick (1867) Letter to Jonathan Webster, 7 July, MS-Papers-247, Turnbull Library, Wellington, N.Z.

——— (1871) Memorandum, 2 Sept., on draft of Native Land Court Act of 1871, MA 13/2e, National Archives, Wellington, N.Z.

——— (1872a) Letter to Spencer von Stürmer, 5 Aug., qMS-1238, Turnbull Library, Wellington, N.Z.

——— (1872b) Letter to von Stürmer, 19 May, qMS-1238, Turnbull Library, Wellington, N.Z.

——— (1872c) Letter to von Stürmer, n.d. ("Saturday"), qMS-1238, Turnbull Library, Wellington, N.Z.

——— (1872d) Letter to von Stürmer, 10 Jan., qMS-1234, Turnbull Library, Wellington, N.Z.

——— (1873a) Letter to von Stürmer, 9 Feb., qMS-1234, Turnbull Library, Wellington, N.Z.

——— (1873b) Letter to von Stürmer, 13 Mar., qMS-1234, Turnbull Library, Wellington, N.Z.

——— (1873c) Letter to von Stürmer, 21 July, qMS-1234, Turnbull Library, Wellington, N.Z.

——— (1876a) Letter to von Stürmer, 3 July, qMS-1235, Turnbull Library, Wellington, N.Z.

———(1876b) Letter to von Stürmer, 2 Dec., qMS-1235, Turnbull Library, Wellington, N.Z.

——— (1879a) Letter to von Stürmer, n.d. ("Friday"), qMS-1235, Turnbull Library, Wellington, N.Z.

——— (1879b) Letter to von Stürmer, 30 Nov., qMS-1235, Turnbull Library, Wellington, N.Z.

Mantell, Walter (1856) Letter to Labouchere, 5 July, MS-Micro-48, Turnbull Library, Wellington, N.Z.

Marr, Cathy (1997) *Public Works Takings of Maori Land, 1840–1981 (Rangahaua Whanui National Theme G).* Wellington, N.Z.: Waitangi Tribunal.

Martin, William (1865) *Notes on the Best Mode of Introducing and Working the Native Lands Act.* Auckland: Mitchell & Seffern.

McHugh, Paul (1991) *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi.* Auckland, N.Z.: Oxford Univ. Press.

Miller, John (1958) *Early Victorian New Zealand: A Study of Racial Tension and Social Attitudes 1839–1852.* London: Oxford Univ. Press.

Mitchell, Thomas (1833 & 1836) "Deeds of Purchase from Natives of Land at Hokianga & at Manakau," MS-Papers-458, Turnbull Library, Wellington, N.Z.

Monin, Paul (1995) "The Maori Economy of Hauraki 1840–1880," 29 *New Zealand J. of History* 197–210.

Moore, Duncan, Barry Rigby, & Matthew Russell (1997) *Old Land Claims (Rangahaua Whanui National Theme A).* Wellington, N.Z.: Waitangi Tribunal

Native Land Court (1882) "Report on alleged irregularities regarding the Ohinemuri Gold Fields," MA-MLP 1/1882/327, National Archives, Wellington, N.Z.

NZPD (*New Zealand Parliamentary Debates*).

Parsonson, Ann (1992) "The Challenge to Mana Maori," in Geoffrey W. Rice, ed., *The Oxford History of New Zealand.* 2d ed. Auckland, N.Z.: Oxford Univ. Press.

Peek, Cuthbert Edgar (1883) Letter to his father, 8 Apr., MS-Papers-3602, Turnbull Library, Wellington, N.Z.

Polack, J. S. (1838) *New Zealand: Being a Narrative of Travels and Adventures During a Residence in that Country Between the Years 1831 and 1837.* London: Richard Bentley. Reprint, Christchurch, N.Z.: Capper Press, 1974.

Radin, Margaret Jane (1987) "Market-Inalienability," 100 *Harvard Law Rev.* 1849–1937.

Rigby, Barry (1992) *Empire on the Cheap: Crown Policies and Purchases in Muriwhenua 1840–1852.* WAI 45/F8. Wellington, N.Z.: Waitangi Tribunal.

Seth-Smith, H.G. (1890) Letter to Alexander Mackay, 11 Dec., MLC 8/2, National Archives, Wellington, N.Z.

Simkin, C.G.F. (1954) *Statistics of New Zealand for the Crown Colony Period, 1840–1852.* Auckland, N.Z.: Auckland Univ. College Dept. of Economics.

Sinclair, Keith (1961) *The Origins of the Maori Wars.* 2d ed. Auckland, N.Z.: Auckland Univ. Press and Oxford Univ. Press.

——— (1988) *A History of New Zealand.* Auckland, N.Z.: Penguin.

Smith, Norman (1948) *The Maori People and Us.* Wellington, N.Z.: A.H. & A.W. Reed.

Smith, T. H. (1868) Notes at 35–37, Wairarapa Minute Book 1A, Micro-MS-Coll-06-010, Turnbull Library, Wellington, N.Z.

Sorrenson, M.P.K. (1955) *The Purchase of Maori Lands, 1865–1892.* M.A. Thesis, Auckland Univ. College.

——— (1956) "Land Purchase Methods and Their Effect on Maori Population, 1865–1901," 65 *J. of the Polynesian Society* 183-99.

Spiller, Peter (1992) *The Chapman Legal Family.* Wellington, N.Z.: Victoria Univ. Press.

Spiller, Peter, Jeremy Finn, & Richard Boast (1995) *A New Zealand Legal History.* Wellington, N.Z.:Brooker's.

Stafford, Edward William (ca. 1870s) "Native Lands," MS-2044, Turnbull Library, Wellington, N.Z.

Stirling, Eruera, as told to Anne Salmond (1980) *Eruera: The Teachings of a Maori Elder.* Auckland, N.Z.: Oxford Univ. Press.
Waitangi Tribunal (1997) *Muriwhenua Land Report.* WAI 45. Wellington, N.Z.: GP Publications.
Wakefield, William (1839) Deed, 25 Oct., MSO-Papers-3730, Turnbull Library, Wellington, N.Z.
Ward, Alan (1974) *A Show of Justice: Racial "Amalgamation" in Nineteenth-Century New Zealand.* Auckland, N.Z.: Auckland Univ. Press, 1995.
——— (1997) *National Overview (Waitangi Tribunal Rangahaua Whanui Series).* Wellington, N.Z.: GP Publications.
Wards, Ian (1968) *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832–1852.* Wellington, N.Z.: Dept. of Internal Affairs.
Wentworth, William Charles (1840) Deed, 15 Feb., fMS-257, Turnbull Library, Wellington, N.Z.
Wheoro, Wiremu te (1871) Letter to Donald McLean, 8 Apr., MA 13/2b, National Archives, Wellington, N.Z.
White, John (1871) Memorandum, received 29 June, MA 13/2c, National Archives, Wellington, N.Z.
White, William Bertram (1908–09) "Highlights in the Life of William Bertram White," MS-Papers-4542, Turnbull Library, Wellington, N.Z.
Whitmore, G.S. (1864) Letter to Donald McLean, 24 Nov., MS-1329, 96-97, Turnbull Library, Wellington, N.Z.
Wikaira, Jeanette Marie (1995) *The Alienation of Maori Land in Hauraki 1852–1882.* M.A. Thesis, Univ. of Auckland.
Wyatt, Philippa (1991) *The Old Land Claims and the Concept of a 'Sale': A Case Study.* M.A. Thesis, Univ. of Auckland.

Case Cited

R. v. Symonds, N.Z.P.C.C. 387 (1847)

Statutes Cited

An Ordinance to Repeal. . .of 1841, N.Z. Stat., No.2
Native Land Purchase Act of 1846, N.Z. Stat., Ni.19
Native Lands Act of 1867, N.Z. Stat., No. 43
Native Lands Act of 1869, N.Z. Stat., No. 26
Immigration and Public Works Act Amendment Act of 1871, N.Z. Stat., No. 75
Native Land Act of 1873, N.Z. Stat., No. 56
Native Land Act of 1873 Amendment Act of 1878, N.Z. Stat., No.1
Native Land Act Amendment Act of 1878, N.Z. Stat., No. 40
Native Land Administration Act of 1886, N.Z. Stat., No. 23
Native Land Act of 1888, N.Z. Stat., No. 36
Native Land Court Act of 1894, N.Z. Stat., No. 43
Native Land Act of 1909, N.Z. Stat., No. 15